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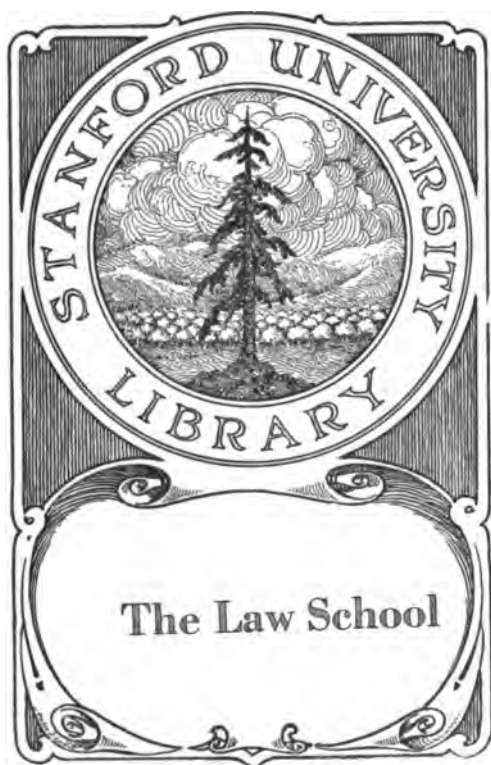
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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF VICTORIA.

BY

ALFRED WYATT,

OF THE MIDDLE TEMPLE, LONDON;

GEORGE H. F. WEBB,

OF THE SUPREME COURT OF VICTORIA;

AND

THOMAS A'BECKETT,

OF LINCOLN'S INN, LONDON;

ESQUIRES, BARRISTERS-AT-LAW.

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OF THE
SUPREME COURT OF VICTORIA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

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IN the vacation after Michaelmas Term, 1869, GEORGE PATON SMITH, Esq., resigned the office of Attorney-General for the Colony of Victoria, and was succeeded by MORGAN AUGUSTUS McDONNELL, Esq.

IN Michaelmas Term, 1869, JAMES JOSEPH CASEY, Esq., was appointed to the office of Solicitor-General for the Colony of Victoria, formerly vacant.

IN the vacation after Michaelmas Term, 1869, JAMES JOSEPH CASEY, Esq., resigned the office of Solicitor-General for the Colony of Victoria, which thereupon became vacant.

Raac. A. Raac.

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OF THE
NAMES OF THE CASES REPORTED
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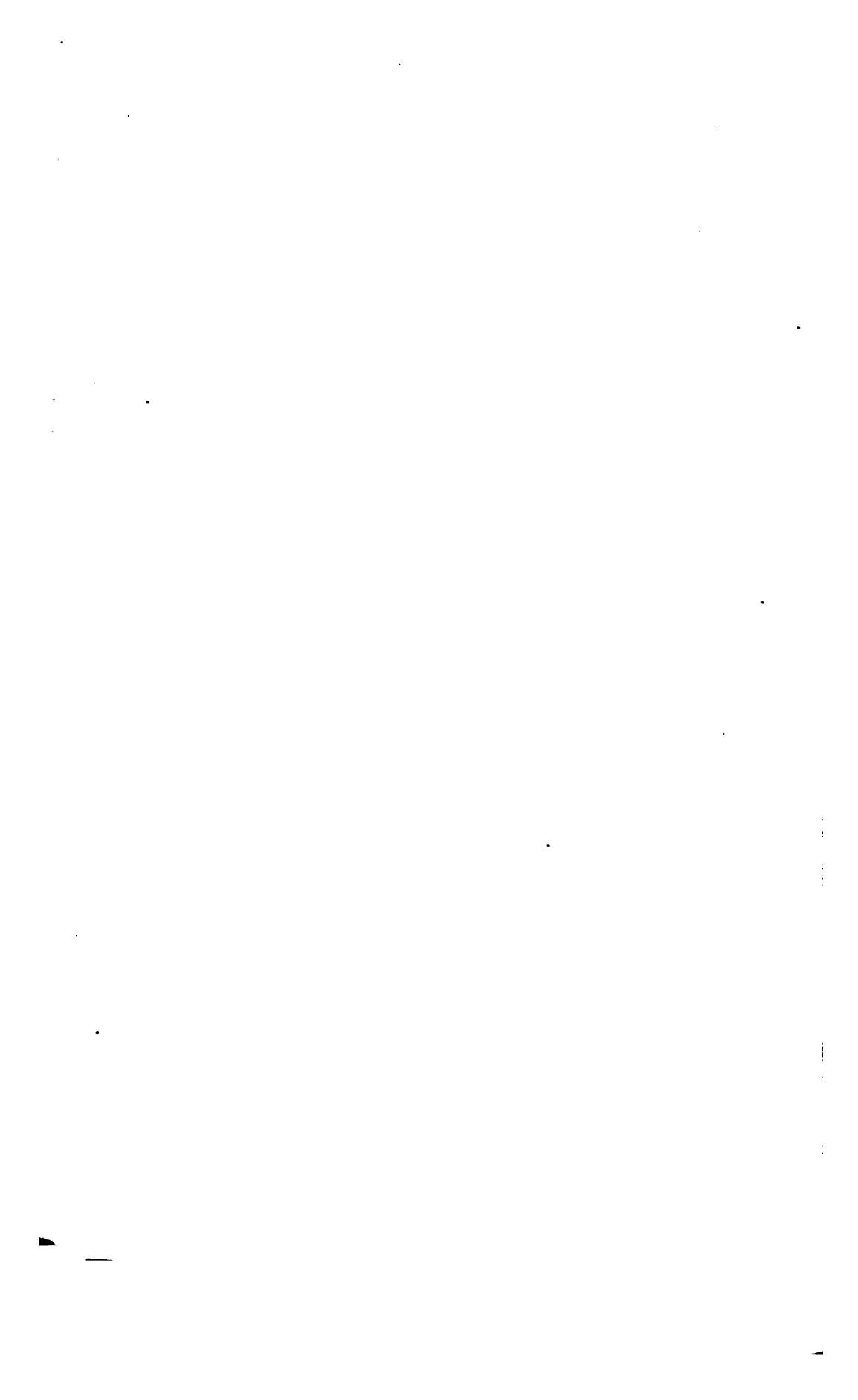
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,

IN EQUITY.

BEFORE

HIS HONOR ROBERT MOLESWORTH, Esq.,

ONE OF THE JUDGES OF THE COURT,

AND ON APPEAL TO THE FULL COURT.

DURBRIDGE v. SCHOLLES.

A SUIT was instituted on behalf of *Durbridge*, the infant Plaintiff, by *Stanmore*, his next friend, against *Scholes*, the infant's step-father, who was in possession of part of the lands devised in fee to trustees for the infant, and had purported to demise the remainder on a mining lease. The bill prayed the appointment of new trustees of the infant's father's will, the appointment of a guardian for the infant, and an account of rents and profits come to *Schole's* hands, but made no mention of the mining lease.

Another suit was afterwards instituted on behalf of the same Plaintiff, by another next friend, for the same purposes as the first suit, but also specifically directed to the mining lease, and the recovery of the land comprised in it, making the lessees parties.

Pending the hearing of cross motions, in both suits, for a reference to the Master as to which of the two would be

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The mere filing of a bill by a next friend of an infant, seeking an account of the infant's property, and the appointment of new trustees, without any order having been made, does not make it a contempt for another person to proceed at law on the infant's behalf, by an action of trespass; and no leave of the Court to institute such proceedings at law, is necessary.

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more beneficial to the infant, and for an interim stay of proceedings; notice of motion was given on behalf of the Plaintiff in the second suit, that the leave of the Court might be given to him, to institute and prosecute actions of trespass and ejectment at common law, by his next friend in the second suit, against certain of the Defendants in the second suit, in respect of the land mentioned in both suits, on the ground that such actions would be for the infant's benefit. It appeared, upon affidavit, that proceedings for contempt of Court had been threatened by the proposed Defendants at law, and the motion was made in consequence of such threats.

The three motions came on to be heard together.

Argument.
 —

Dr. Mackay for the motion for leave to proceed at law, was stopped by Mr. Justice Molesworth, who expressed his opinion that no leave was necessary.

Mr. Atkins, Mr. Bunny, Mr. J. W. Stephen, and Mr. Holroyd, *contra*, did not argue the point.

Judgment was reserved upon the three motions.

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 —
Judgment.

MR. JUSTICE MOLESWORTH, after disposing of the other motions, proceeded as follows :—

There is also another motion, for leave to bring an action of ejectment and trespass against the miners. It appears that an action of ejectment and trespass has already been commenced; and by the new jurisdiction at common law, an injunction can be granted as ancillary to an action of trespass and ejectment, and it was intended to apply for an injunction to stop the mining. These proceedings, which were commenced by the nominee of Scholes, have

been discontinued, from an apprehension that they might be regarded as a contempt of this Court. I have looked for authorities on this subject, but can not find any to show that it is necessary to apply to this Court for liberty to take other proceedings. It was said truly, that filing a bill on behalf of an infant has been held to make the infant a ward of Court. The only case in which I find this to have been acted upon, is in the marriage of the infant after the bill is filed, being held a contempt of Court. If a guardian were appointed to the infant, it might be a contempt of the Court for anybody else to usurp that which ought to be the duty of the guardian: or, if a receiver were appointed, even without reference to the infancy, it might be a contempt to proceed by an action of trespass relative to land upon which the receiver had been appointed. The question here, is, if a bill be filed by a next friend in this Court, seeking an account of the infant's property, and the appointment of new trustees; whether the mere filing of that bill, without any order having been made, makes it a contempt for another person to proceed at law on his behalf by an action of trespass? Not finding any authority on the subject, I think no leave necessary. If the learned counsel on behalf of the infant's next friend, can find any authority, I will grant the motion. At present, I shall refuse it without costs. This Court will have power to deal with the land or damages recovered, so as to guard the infant's rights (a).

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(a) No authority was produced.

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Feb. 4, 8.

[IN CHAMBERS (b).]

A judgment overruling a plea in equity, does not conclude the merits of the case, within the meaning of the 15 *Vic.*, No. 10, sec. 33, so as to entitle the unsuccessful party to obtain leave to appeal to the Privy Council.

Semble, that in a suit to restrain a mining trespass, and for an account of gold removed, where no account has as yet been directed, the fact that if such account be directed at the hearing the matters then in issue will involve claims respecting property to the value of £1,000, will not, as to appealable amount, authorise an appeal to the Privy Council.

SUMMONS for leave to appeal to the Privy Council from the Order of the full Court on appeal, overruling the plea of the Defendants. The suit was instituted, by information and bill, by the Attorney-General, at the relation of the Bonshaw Freehold Gold-Mining Company Registered, and the same Company as Plaintiffs against the Prince of Wales Company Registered, to restrain further encroachments by the Defendants upon the freehold property of the Company Plaintiffs, and praying an account of the gold already removed. The Defendants put in a plea traversing the incorporation of the Company Plaintiffs. This plea was allowed by the primary Judge, but overruled by the full Court on appeal (24th December, 1868). On the 21st January, 1869, during vacation, the Defendants took out a summons before Mr. Justice *Williams* for the 22nd January, for leave to appeal to the Privy Council. The summons was adjourned by His Honor at the request of the Defendants, on payment by them of the Plaintiff's costs of appearing, and ultimately came before Mr. Justice *Barry* (February 4th).

Mr. *A'Beckett* in support of the summons.

Mr. *Bunny* (with him Mr. *Webb*) took a preliminary objection. The thirty days allowed by the Act for an

Where a summons for leave to appeal to the Privy Council had been taken out for a day within the thirty days allowed by 15 *Vic.*, No. 10, sec. 33, and had on that day been adjourned by the Judge to a day without the thirty days,

Held, that the application for leave to appeal, having been originally made within the thirty days, was sufficient.

(b) Coram *Barry*, J.

application for leave to appeal has now expired, and the adjournment of the summons by Mr. Justice *Williams*, did not confer jurisdiction to hear the application after the thirty days had elapsed. Moreover, this summons was taken out under the emergency clause (15 *Vic.*, No. 10, sec. 19), there being then no Court sitting. This emergency no longer exists, as the Equity Court is now sitting, and a Judge in Chambers has therefore no jurisdiction to entertain an application which should properly be made to the Court sitting in Equity.

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MR. JUSTICE BARRY:—As this involves the propriety of the adjournment of the summons by Mr. Justice *Williams*, I must decline to hear it, and will refer the summons back to Mr. Justice *Williams*.

The summons now again came on before Mr. Justice *Barry*, in consequence of the absence from town of Mr. Justice *Williams*, and of communications which had passed between their Honors. February 8.

MR. JUSTICE BARRY:—I have considered the objection raised on a former day, and think that the application for leave to appeal having been originally made within the thirty days, was sufficient. I will therefore hear the application upon its merits.

Mr. *Holroyd* (with him Mr. *A'Beckett*) in support of the summons. The Order sought to be appealed from, is one by which, within the meaning of the Act (15 *Vic.*, No. 10, sec. 33), "the merits of the case *may be concluded*." The plea having been overruled, the Defendants can make no further defence to the bill, for the Plaintiffs are now entitled to a decree as prayed: *Wood v. Strickland* (c).

(c) 2 V. & B., 158.

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[*Barry, J.*—The Defendants may, if they think fit, put in an answer. That is provided for by the Rules of Court, cap. vi., rule 7]. If the plea had been allowed, the whole suit would have been terminated. The Plaintiffs then, might unquestionably have appealed; and as held by the full Court in *Ex parte Rolfe & Bailey (d)*, if the Court would have jurisdiction to grant leave to appeal to one party, it must have it for the other. [*Barry J.* In that case the question was only as to the amount in issue.] Here it is sworn generally "that the matters in issue involve claims respecting property to the value of £1,000 sterling;" and it is also sworn that if the Plaintiffs obtain the relief prayed for, *inter alia* inspection of the Defendants' mine, the cost of such inspection to the Defendants will exceed £1,000, and also, that the value of the gold in dispute exceeds £1,000.

Mr. *Bunny* (with him Mr. *Webb*) *contra*. This case does not come within either of the requirements of the Act as to giving leave to appeal. By the overruling of the plea, the merits of the case are not concluded, for the plea did not go to the merits at all, but only to the question of the incorporation of the Plaintiff Company. The Defendants may now, by obtaining time to answer, put in a defence to the suit, if they have any, and this is their proper course. *Dan. Chy. Prac.*, 4th ed., 649, *Mitford on Pleading*, 17. The Court will not, in such a case, grant leave to appeal. *Re Young (e)*. Again, the matter in issue does not amount to £1,000. The only object of the suit is to restrain the Defendants trespassing upon the Plaintiffs' land. The Plaintiffs have offered to waive the account prayed by the bill, but at present no account is ordered, and even if it were, it is uncertain what amount might be found due to the Plaintiffs. As to the costs of inspection, the Plaintiffs are, by the order, giving leave to inspect, ordered to pay all the costs of such inspection.

(d) 2 W. & W., I.E. & M., 55. (e) 35 L. J., Prob., 126.

CASES IN EQUITY.

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MR. JUSTICE BARRY :—

I do not consider myself at liberty to grant this leave to appeal. The words of the Act "by which decision the merits of the case may be concluded," are, I think, to be interpreted in the same way as the words "final judgment, decree, order, or sentence," in the Order in Council, as to appeals. In this case the judgment on the plea does not conclude the suit, because an answer may be put in ; and unless an answer be put in, the case must be set down for hearing in the absence of the Defendants, and a final decree made. That is perfectly clear, and I might rest my decision solely upon that, and perhaps it would be safer to do so. But I may mention that I do not think the question of amount is at all clear. This is a suit rather to try a right, than to get payment of a sum of money. It is perfectly problematical whether an account may or may not be directed ; and it is absolutely uncertain whether a shilling may be found due, by the Defendants to the Plaintiffs. I cannot accept the view suggested, that the probable costs of preparing for an inspection, which costs the Plaintiffs will have to pay, can bring the case within the Act. There is nothing to prevent an application to Her Majesty for leave to appeal, but I do not think it would be lawful for me to grant such leave.

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COMPANY

Judgment.

Summons dismissed, with costs.

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Oct. 14, 22.
Dec. 15, 16.1869.
Feb. 8, 15.

THE UNITED WORKING MINERS' GOLD MINING
COMPANY REGISTERED v. THE PRINCE OF
WALES COMPANY REGISTERED.

In cross suits
in a Court of
Mines,
between
the Working
Miners' Com-
pany and the
Prince of
Wales Com-
pany, the
decree fixed a
boundary line,
restrained the
companies
respectively
from mining
on opposite
sides of it, and
ordered an
account and
payment of
the gold taken
beyond that
boundary.
On appeal to
the Chief
Judge of
Courts of
Mines, he
varied the

THE Bill in this suit stated that in July, 1862, forty-six persons, through whom the Plaintiffs now claim, took possession of, and applied to be registered for, a frontage claim on the Golden Point Lead, Ballarat. By arrangement with the Defendant company, the claim applied for, which, to some extent, overlapped other claims of the Defendant company, was reduced in extent from 3,450 feet to 2,325 feet, and a line was drawn east and west as the southern boundary of the claim; and it was agreed between those through whom the Plaintiff and Defendant companies respectively now claim, that the forty-six persons should obtain registration for their claim north of such agreed boundary line, and the Defendants should obtain registration for a claim on the same lead, south of such agreed boundary line. Under this agreement the forty-six persons through whom the Plaintiffs claim were registered for their claim, and the Defendant company were registered for another claim immediately southerly, both on

decree, by declaring that the boundary line should be deemed to determine the rights of the parties only with regard to their claims upon the Frenchman's Lead, and so far as shewn by then discoveries as to the course of leads. Upon bill in equity, filed by the Working Miners' Company against the Prince of Wales Company, stating that since the decree it had been discovered by subsequent workings that all the gold removed by the plaintiffs south of the decreed boundary was upon the Golden Point Lead, and within the Plaintiffs' claim on that lead, and seeking an injunction against the defendants prosecuting the decree in the Court of Mines, or further mining within the plaintiffs' claim on the Golden Point Lead, and for an account,

Held, per *Molesworth*, J., that the suit could not be properly commenced without the leave of the Supreme Court in Equity first obtained; and motion that the bill and writ of summons should be set aside for irregularity, granted with costs. On appeal,

Held, that the rule requiring the previous leave of the court, did not apply to proceedings instituted in different courts of co-ordinate jurisdiction, and appeal allowed, with costs.

On demurrer, *Held*, per *Molesworth*, J., that, independently of the relief sought as to the previous decree, the bill made a case entitling the plaintiffs to an injunction and account, and general demurrer overruled, with costs.

the Golden Point Lead ; and by mesne assignments the claim of the forty-six persons is now vested in the Plaintiff company. In October, 1866, the Defendant company took up and were registered for a block claim, comprising a large portion of the Defendants', and of the Plaintiffs', frontage claims on the Golden Point Lead. The Bill then alleged that the Defendants, under pretence that they were mining within their block claim, had been working in the Plaintiffs' frontage claim, and removing auriferous earth therefrom ; that the Defendants sometimes pretended that the said gold was from the Frenchman's Lead, on which they alleged they had a claim ; but the Plaintiffs submitted that the Defendants had no legal title to any frontage claim on that lead, their pretended claim not having been properly marked out and registered ; and they also charged that the gold was not upon the Frenchman's Lead. The Bill then stated that in May, 1868, two cross suits were instituted in the Court of Mines at Ballarat, in one of which the Working Miners' Company were Plaintiffs, and the Prince of Wales Company Defendants ; and in the other the Prince of Wales Company were Plaintiffs, and the Working Miners' Company Defendants ; and that a decree was made in each suit by the Judge of the Court of Mines at Ballarat restraining the Prince of Wales Company from working north, and the Working Miners' Company from working south, of a line marked X 2 on a plan annexed to such decree ; but that, on appeal in both suits, the Chief Judge of the Court of Mines ordered " that such decree be varied by declaring that the said boundary line should be deemed to determine the rights of the parties to the said suits only with regard to their claims upon the Frenchman's Lead, and so far as was shewn by then present discoveries as to the course of leads " The Bill then alleged that the gold which the Defendants were charged with removing was from ground to the south of the line X 2, but to the northward of the agreed boundary line, between the claims of the Plaintiff and Defendant Companies ;

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averred "that it is now discovered, as the fact is, that the gold so being removed is not situated upon and does not form part of the Frenchman's Lead;" and submitted that the Defendants were not, under the decree of the Court of Mines, entitled to remove it. The Bill then stated, that by the decree of the Court of Mines the present Plaintiffs were ordered to account for the gold they had taken south of the line X 2, but that "since the making of the said decree it has been discovered by subsequent workings that all the gold removed by the present Plaintiffs from the land south of the said line X 2 was situate upon and formed part of the said Golden Point Lead and the Plaintiffs submit that having regard to the said decree as varied by His Honor the Chief Judge and of such subsequent discoveries the Defendants ought not further to prosecute the accounts or enforce payment of any amount found due upon taking such accounts." The Bill prayed that the Defendants might be restrained from carrying on further mining in the Plaintiffs' said claim (on the Golden Point Lead), and from further prosecuting the accounts directed by the decree in the Court of Mines, or enforcing payment of any amount found due upon taking such accounts; and for an account of all gold removed by the Defendants from the Plaintiffs' said claim, and for payment of what might be found due on taking such account.

To this bill the Defendants demurred on the following grounds:—(1.) Want of Equity; (2.) That the Court had no jurisdiction to entertain the suit; (3.) That the relief prayed by the bill could only be obtained, if at all, by some proceedings in the Court of Mines in the nature of a bill of review, which could only be instituted by leave of the said Court; (4.) That it did not appear by the bill that the Plaintiffs had duly performed the decree therein mentioned; (5.) That it appeared by the bill that there was another suit pending

between the same parties, and in respect of the same subject matter.

The Defendants also served upon the Plaintiffs a notice of motion to set aside the Writ of Summons and Bill for irregularity, with costs; or that the proceedings in the suit might be stayed until the Plaintiffs should have performed the decree of the Court of Mines, and of the Chief Judge of Courts of Mines, on appeal, by proceeding with the accounts thereby ordered to be taken, and that the Plaintiffs might pay the costs of the application.

The suit now came before the Court upon the above notice of motion, and also upon the demurrer, which were both argued together.

Mr. *Bunny* and Mr. *Holroyd* for the Defendants, in support of the motion, and demurrer.—The chief object of this bill is to reverse a decree of a competent court. The Plaintiffs are in this suit endeavouring, by an original bill, to get relief, which can only be granted upon doing away with the decree already made in the Court of Mines. This bill, although not in form a bill of review, is so in substance, and could not properly be filed without the leave of the Court, *Hodson v. Ball* (*f*), and the proper course to get rid of it is by a motion to take it off the file, *Davis v. Bluck* (*g*). Before obtaining leave to file a bill of review on the discovery of fresh evidence, the Plaintiff must perform all that the original decree orders him to do. *Part-ridge v. Usborne* (*h*), *Palmer v. Danby* (*j*). Before obtaining leave to file a bill of review, there must be an affidavit that the new matter could not be produced or used at the former hearing. *Mitford on Pleading*, 84, *Hosking v. Terry* (*k*). [*Molesworth*, J.—Have you any

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(*f*) 11 Sim., 456. Affd. 1
Phil., 177.
(*g*) 6 Beav., 893.

(*h*) 5 Russ., 195.
(*j*) *Ib.*, 239.
(*k*) 8 Jur., N. S., 975.

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authority as to the objections of there being no affidavit, and no leave of the Court being allowed where the bill of review is a proceeding in a different court?] This is not technically a bill of review. It is in fact bringing the two Courts into conflict. The proper course for the Plaintiffs would be to apply to the Court of Mines to re-hear the case. This bill is demurrable, for a demurrer will lie where a bill impeaches or interferes with another decree, *Wortley v. Birkhead* (l), *Portington v. Turbock* (m). There is no jurisdiction in this Court to restrain the Court of Mines proceeding on the decree in that Court. Fraud is the only ground on which one court will interfere with the decree of another court of competent jurisdiction, *Bainbrigge v. Baddeley* (n), *Toulmin v. Copeland* (o), *Head v. Godlee* (p), *Prudential Assurance Company v. Thomas* (q), *Warrington v. Wheatstone* (r).

Mr. J. W. Stephen and Mr. Webb for the Plaintiffs *contra*.—This is not a bill of review; and a bill of review would not lie in the Court of Mines. A bill of review only applies to the Court of Chancery in England, in cases where a decree has been made and enrolled. It can not apply to a statutory court, with limited jurisdiction, like the Court of Mines. It was no contempt of the Court of Mines to file this bill, for the decree of the Court of Mines reserved to the present Plaintiffs leave to re-open the question if it should subsequently be found that the gold in question was in fact on the Golden Point Lead. This might be done by suit in this Court, for it has been already decided, in *Mulcahy v. The Walhalla Company* (s), that notwithstanding the statutory jurisdiction conferred on the Court of Mines, this Court can entertain suits relative to mining claims. New facts have been discovered, and the Plaintiffs now avail themselves of the

(l) 2 Ves., sen., 571.
 (m) 1 Vern., 177, 184.
 (n) 2 L'h., 705.
 (o) *Ib.*, 711.

(p) 29 L. J. Chy., 633.
 (q) 37 *Ib.*, 202.
 (r) Jac., 202.
 (s) Sup. Ct., Vic., June, 1868.

liberty reserved by the Court of Mines. This bill, not being a bill of review, or a bill in the nature of a bill of review, may be filed without the leave of the Court, *Taylor v. Taylor* (t). Even if we could have proceeded by suit in the Court of Mines, we are not thereby precluded from instituting this suit in Equity, *Williams v. Roberts* (v). As to the demurrer, this bill not only seeks to restrain the Defendants from proceeding upon the decree of the Court of Mines, but also to restrain future trespass upon the *locus in quo*; and the Plaintiffs are, upon the case made by the bill, clearly entitled to the latter relief, even if the Court should be of opinion that they are not entitled to the former; and therefore the Plaintiffs being, at all events, entitled to some of the relief prayed, the demurrer cannot be allowed.

Mr. Bunny in reply.

Cur. adv. vult.

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MR. JUSTICE MOLESWORTH :—

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 ———
Judgment.

These were cross suits between the companies, Plaintiff, and principal Defendant in the District Court of Mines, Ballarat, which were decided by the learned judge fixing a line of boundary between them on a plan, and restraining them respectively from mining beyond their side of the boundary, and the now Plaintiff company was ordered to account for the gold it had taken beyond, that is south of, that boundary. The account is still pending. Upon appeal to me, I, on the 11th September last, varied that decree only by declaring that the boundary line should be deemed to determine the rights of the parties with regard to their claims upon the Frenchman's Lead, and so far as was shown by their then discoveries as to the course of leads. The litigant parties had each a variety of claims,

(t) 12 Beav., 220. Affd., 1 Mc. & G., 397. (v) 8 Hare, 315, 324.

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or pretences to claims, frontage on different leads, and blocks, intersecting and overlapping one another. This decree left room for subsequent discussion upon subsequent discovery, and the present Bill under the equity jurisdiction of the Supreme Court states that since the making of the decree it has been discovered by subsequent workings that all the gold removed by the present Plaintiffs south of the decreed boundary was upon the Golden Point Lead, and within their limits as on that lead, and insists that the accounts directed by the decree should not be prosecuted; and seeks an injunction against the Defendant company mining within such last-mentioned limits and prosecuting the decree, an account and payment of what the Defendant company have already taken thereout.

The Defendant company brought forward a motion that the writ of summons and bill may be set aside for irregularity with costs, with an alternative. The irregularities relied upon in argument are, that this being a suit to set aside a decree was commenced by the Plaintiff not having leave or affidavits to verify, and not having performed the decree. The Defendant company has also filed a demurrer to the Bill, relying mainly on a want of jurisdiction in the Supreme Court to entertain such a suit. I have the arguments upon the motion and demurrer blended.

It has been argued for the Plaintiff, rather in regard to the demurrer than the motion, that the decree is to be regarded as settling rights without prejudice to subsequent discoveries as to the course of leads, and that the Supreme Court, as one of concurrent jurisdiction, may entertain the question of the rights so left undecided. The commencement of such a suit before different judges is very inconvenient, and not deserving of encouragement. See *Taylor v. Taylor (w)*. But with regard to the motion, I shall discuss the subject as adopting this argument. If the decree in

(w) 1 Mc. & G., 397.

question were one of this Court and the Bill in it, and framed as fully admitting the propriety of the former decree, and merely seeking relief consistent with it in regard to subsequent discoveries, I think, according to the authorities, it should not be filed without leave if seeking to obstruct or vary the working of the former decree. *Worley v. Birkhead* (x), *Hodson v. Ball* (y), and several other cases to which I have been referred, to which I add *Chute v. M'Gillicuddy* (z), were cases in which the Plaintiffs did not allege that there was anything wrong in the previous decree according to the facts then presented to the Court, but relied on some additional facts, in some cases prior in some subsequent to the decrees, as showing they should be varied. But this Bill is not framed in clear submission to the former decree and admission of its cogency as facts stood up to its date. Paragraph 10 says, "It is now discovered, as the fact is, that the said gold is not situated upon the Frenchman's Lead;" which might include evidence existing before but not discovered until after the decree; and paragraph 8 charges "that the Defendants have no legal title to any frontage upon the Frenchman's Lead, their said pretended claim never having been properly taken up, marked out, or registered," "and that no portion of the gold so being removed by the Defendants is situate upon the Frenchman's Lead;" clearly combating the points decided in the decree. The Plaintiffs probably would not be allowed to controvert the former decree, but this bill affects to do so. As to the objection that the Plaintiffs have not performed the decree, I think there is no material for it, as it imposed no duty on them as to which they should be the first actors: *Partridge v. Usborne* (a).

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Assuming, then, that this Court would set aside this Bill if filed without leave to vary a decree of its own, I

(x) 2 Ves., 571; S. C., 3 Atk., 809. (z) 11 I. E. R., 312.
 (y) 11 Sim., 456. (a) 5 Russ., 195.

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think a similar leave should be obtained before filing a bill to vary the decree of a Court of concurrent jurisdiction. I have found no authority on the point, but, on principle, think that a party to previous litigation elsewhere is equally entitled to preliminary discussion to protect him from a Plaintiff's perhaps vexatious spirit of litigation. I shall, therefore, set aside the writ of summons and bill for irregularity, inasmuch as they seek to vary and delay the decree of the Court of Mines, and were commenced without the leave of this Court first obtained; and order the Plaintiff company to pay the costs of the application.

The demurrer properly could not be considered until after the motion, and I shall say as to it "No order," which will practically leave the parties to abide their own costs. The Plaintiffs have served a notice of motion for an injunction, which this order will make abortive. I shall be glad to hear what Counsel have to say as to the costs of it, and postpone my formal order on the Defendants' motion until I have heard that discussion.

Mr. J. W. Stephen.—The case is out of Court, the bill having been set aside for irregularity, and there is no jurisdiction to give costs of the injunction.

MR. JUSTICE MOLESWORTH:—The Plaintiffs filed an irregular bill, and served a notice of motion for an injunction; the opposite party was warranted in applying to set aside the bill, and also in preparing to defend themselves against this motion, and I think therefore, they should get the costs. The difficulty suggested can be got over by including them in this order, and I will direct Plaintiffs to pay the Defendants their costs of preparing to resist the motion for injunction.

From this judgment the Plaintiffs now appealed to the full Court (b) on the following grounds:—(1.) That the judgment of His Honor was grounded upon the practice of the Court of Chancery, requiring the leave of the Court to be obtained before filing a bill of review, whereas Plaintiffs' bill in this cause is not in fact a bill of review, or a bill in the nature of a bill of review. (2.) That it is not the practice to apply for, nor is there any jurisdiction to grant, the leave of this Court before the institution of a suit therein, for the institution of such suit, at all events on the ground of the existence of a decree in some other court. (3.) That the Plaintiffs' Bill in this cause does not seek to vary or delay the decree of the Court of Mines in the said order of the 22nd day of October, 1868, mentioned, but having regard to the allegations in their Bill is consistent with such decree. (4.) That upon the facts alleged in the said Bill, the Plaintiffs were at all events entitled to some of the relief prayed thereby, and such allegations were so admitted by the demurrer. (5.) That the writ of summons and Bill in this cause ought not to have been set aside; but, on the contrary, the motion to set aside the same, should have been dismissed with costs, and the demurrer of the said Defendants, the Prince of Wales Company Registered, ought to have been overruled with costs. (6.) That the injunction in this cause, notice of motion for which was given by the Plaintiffs on the 8th day of October, 1868, ought to have been granted. (7.) That the Plaintiffs ought not to have been ordered, as they are, by the said order of the 22nd day of October, 1868, to pay to the said Defendants, the Prince of Wales Company Registered, their costs of preparing to resist the said motion for an injunction.

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Mr. J. W. Stephen, Mr. Fellows, and Mr. Webb for the Appellants. *Argument on Appeal.*

(b) Coram, Stawell, C.J., Barry, J., and Williams, J.

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Mr. *Bunny* and Mr. *Holroyd* for the Respondents.

The following cases were cited in addition to those cited in the Court below:—For the Appellants—*Jarvis v. Chandler* (c). For the Respondents—*Anon* (d), *Place v. Potts* (e), *Pim v. Wilson* (f).

Judgment on Appeal. THE CHIEF JUSTICE:—

In this case there was a motion to set aside the bill for irregularity, a demurrer, and an application by the Plaintiffs for an injunction. At the outset I wish to say that we studiously refrain from offering any opinion on the demurrer, or the injunction.

The question is simply, whether the rule of practice requiring that before a bill of review, or a bill in the nature of a bill of review, is filed in a Court of Equity in England, the leave of the court in which the original suit was instituted must first be obtained, applies to courts of co-ordinate jurisdiction.

It is said that by analogy the rule that the leave of the Court must be obtained in cases in which two suits are instituted in the same court, should be extended to courts of co-ordinate jurisdiction. But in my opinion the argument fails; for the reason why the leave of the court must be obtained where the two suits are in the same court is, that there must be an end to litigation. In cases where bills of review are filed, the leave of the court to file them is necessary, not because the court wishes to interfere with the rights of the suitor, but because it ought to be satisfied that the bill is one of review, and not one merely to agitate a question which has

(c) T. & R., 319.
 (d) 3 Atk., 350.

(e) 5 H. L. Cas., 383.
 (f) 2 Ph., 655.

been already decided. But the permission, even if it is necessary to be granted by any court, is given by the court in which the first suit was instituted. What other court could know anything about the suit, or could be able to tell whether it was fairly a bill of review or not? The argument seems unanswerable, that if leave is to be obtained at all, it should be from the court where the first suit was commenced, namely the Court of Mines. No other court is so conversant with the case, as to determine at once if this was a bill of review. In this instance it happens that the same person is Chief Judge of the Court of Mines, and Judge of the Equity Court; but supposing the judges were two separate persons, is the record here in such a state that the equity judge would be able at once to pronounce a decree?

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The decision appealed against is also in direct violation of the principle, that the jurisdiction of no court is to be abridged in any other way than by express statutory enactment. This decision abridges the jurisdiction of the Court of Equity; it stops the proceedings in the bud. The case is not heard and disposed of by plea or demurrer; but the Court declares that it will not entertain the cause, because a similar suit was heard by a court of co-ordinate jurisdiction.

Nothing that I have said is to be taken as expressing an opinion, directly or indirectly, whether a plea of the decree of a court of co-ordinate jurisdiction, would be an answer to such a bill as this. The Court cannot, in the summary way proposed of setting aside this bill, abridge the jurisdiction of this Court—a jurisdiction which we are bound to maintain, and which, as I have said, cannot be abridged unless by express statutory enactment. The appeal will therefore be allowed. The order pronounced below will be set aside; and the Appellant allowed the costs below of

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the motion to set aside the bill. The costs of the appeal will follow the result.

MR. JUSTICE BARRY :—

Seven grounds of appeal have been stated in this case, but on two only do I give any opinion, namely, the first and second.

The practice in Chancery relating to bills of review is, that an application is made on affidavit setting out the circumstances under which the decree sought to be reviewed was made, showing that either from a misapprehension of the law, or a misapplication of the law, or from facts which rendered it desirable to review the case, the equitable jurisdiction should be employed to rectify the decree so as to give more ample relief than the decree afforded. The object of requiring such an application is to prevent the same subject matter being agitated a second time in the same court.

In the present instance the bill was not filed in the same court as that in which the first suits were commenced, nor is there any application to that court to alter and vary its own decree, or alter the relief it had given. The jurisdictions of the Court of Mines and the Court of Equity are separate and distinct, and before the Court of Equity is prevented hearing a suit there should be something to show that its jurisdiction was ousted; and this can only be done by plea or demurrer. This case is not ready for determination; it has been dealt with, not by what appears on the record, not by either demurrer or plea, but by affidavits. The Defendants did put in a demurrer, but they afterwards moved to set aside the writ for irregularity; this double mode of procedure showing that they had some mistrust in the strength of their own objections.

MR. JUSTICE WILLIAMS :—

If I may venture to say so, I think the error the learned Judge has fallen into is permitting the knowledge which he obtains as Judge of the Court of Mines to be imported into the Equity jurisdiction. He had nothing before him unless some knowledge which he possessed as judge of a Court of co-ordinate jurisdiction. The question of the jurisdiction of the Court could not be raised, unless by demurrer or plea ; the jurisdiction of the Court could not be ousted unless by something that appeared on the record. A county court judge has no jurisdiction in a case of title, but he must hear the case before he can decide if a question of title is involved.

I think in this instance the learned Judge was premature in setting aside the bill.

Appeal allowed with costs. Order appealed from set aside. Appellant to be allowed costs below, of motion to set aside the Bill.

The Case now again came before the Court upon the demurrer.

Mr. Bunny and Mr. Holroyd, for the Defendants, in support of the demurrer.

Mr. J. W. Stephen and Mr. Webb for the Bill.

The arguments were substantially the same as those reported *ante*, on the previous argument of the motion and demurrer. The following cases were cited :—For the demurrer—*Hodson v. Ball* (g), *Behrens v. Pauli* (h), *Wortley* (g) 1 Ph., 177. (h) 1 Keen, 456.

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v. Birkhead (j), Partridge v. Usborne (k), Trulock v. Robey (l), Toulmin v. Copland (m), Jennet v. Bishop (n), Portington v. Tarbock (o), Head v. Godlee (p), Prudential Assurance Company v. Thomas (q), Jurvis v. Chandler (r), Anon (s), Bateman v. Willos (t), Protheroe v. Forman (v), Taylor v. Shepherd (w), Place v. Potts (x). For the Bill—Law v. Rigby (y), Taylor v. Taylor (z), Bainbrigge v. Baddeley (a).

Cur. adv. vult.

February 15. MR. JUSTICE MOLESWORTH:—

Judgment.

This case comes before me on demurrer to a bill for want of equity—want of jurisdiction in this Court—there being another suit pending for same matter and other grounds.

The bill states that in July, 1862, certain persons, under the Ballarat mining rules, took up a frontage claim on the Golden Point Lead; that this claim overlapped portions of claims of the Defendants' company; that an arrangement was made between those persons and the Defendant company, that as between themselves the former should reduce their claim, and a line of demarcation running east and west should be drawn between them, and trustees for the Defendant company be registered for a frontage claim south of that line, making such claim next successive to the reduced claim, and the said persons and trustees were registered according to the said arrangement; that the right of such persons northward of the said line has by mesne assignments become vested in the Plaintiff

(j) 2 Ves., sen., 571.
 (k) 5 Russ., 195.
 (l) 2 Ph., 395.
 (m) *Id.*, 711.
 (n) 1 Vern., 184.
 (o) *Id.*, 177, 184.
 (p) 29 L. J. Chy., 633.
 (q) 37 L. J. Chy., 202.
 (r) T. & R., 319.

(s) 3 Atk., 350.
 (t) 1 Sch. & Lef., 201.
 (v) 2 Swans., 227.
 (w) 1 Y. & C., Ex., 271, 279.
 (x) 5 H. L. Cas., 383, 388.
 (y) 4 Bro., C. C., 59.
 (z) 1 Mc. & G., 397.
 (a) 2 Ph., 705.

company; that the Plaintiff company has continuously worked their said claim on the Golden Point Lead; that in October, 1866, the company Defendant, by trustees, took possession of and were registered for a block claim, which included part of the Plaintiffs' and part of the Defendants' before-mentioned frontage claims; that the Defendant company, under pretext of mining on their block claim, have been mining on the Golden Point Lead, within the Plaintiffs' frontage claim, and removed large quantities of gold of that lead therefrom; that the Defendants pretend that the said gold is situate upon the Frenchman's Lead, and that they are entitled thereto under a frontage claim upon it; but the Plaintiffs charge that the Defendants have no legal title to any frontage upon the Frenchman's Lead, their claim never having been properly taken up, marked out, or registered, and further charge that no part of the said gold is situate upon the Frenchman's Lead; that in May, 1868, cross suits were instituted in the Court of Mines at Ballarat, to which the two companies were parties, and a decree made on the 27th July, 1868, restraining the Defendant company from working north, and the Plaintiff company from working south, of another line marked on a plan by the Judge of that Court, and that on appeal in these suits to me as Chief Judge of the Court of Mines, it was ordered on the 11th day of September, 1868, that the decree should be varied; that the last-mentioned boundary line should be deemed to determine the rights of the parties only with regard to their claims upon the Frenchman's Lead, and so far as was shown by their present discoveries as to the course of leads; that the portion of the Golden Point Lead from which the Defendants removed gold is situate to the southward of the boundary last-mentioned, and to the northward of the first-mentioned boundary line, and that it is now discovered, as the fact is, that such gold is not situated upon, and is not part of, the Frenchman's Lead, and that the Defendants, therefore, are not under the

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decree entitled thereto, or to remove it from the Plaintiffs' claim; that the decree of the District Court directed that the Plaintiffs should account for and pay to the Defendants the value of the gold taken south of the second boundary line, and such accounts were pending in that Court; that since the making of the decree it has been discovered by subsequent workings that all the gold removed by the Plaintiffs from the land south of the second line formed part of the Golden Point Lead, and that, having regard to the variation of the decree, and the subsequent discoveries, the Defendants ought not to prosecute the accounts, and decree or enforce payment; that the Defendant company is mixing the auriferous earth taken from the place in question with other auriferous earth of their own, so as to produce confusion in accounts. This Bill prays then an injunction to restrain the Defendants from mining within the Plaintiffs' claim, and from prosecuting the accounts directed by the decree, or, at all events, enforcing payment for them on account of gold removed by the Defendant company from the Plaintiffs' claim, and payment of its value, and an inspection.

If there were no previous proceedings in the Court of Mines, I think this bill contains facts for an injunction, and account of and payment for gold taken by the Defendants, on the ground of irreparable mischief, complication of accounts, difficult ascertainment of boundaries, and specific performance of contracts, or some of them. The case was not so argued as to call for more definite opinion.

Much of the confusion of the case in the Court of Mines, and the difference between the learned judge and me, has arisen from the by-laws, as I think, making the respective rights-of-frontage claimholders dependent upon subterranean discoveries as to the course of leads, made after the claims are taken up, by the works of themselves and others. I concurred with him as to the result of the

evidence in the cause upon the then state of discoveries ; but varied the decree in effect by making it without prejudice to the result of further discoveries as to the course of leads. My decree did not convey what I should hold to be the result of a discovery by subsequent workings, that the ground in dispute was upon the Golden Point Lead, or to such discovery having a retrospective operation, so as to change the rights of the parties, as to gold previously found, or their rights under the accounts directed, but it did convey that the rights of the parties to work after such discovery should be according to their boundaries on the Golden Point Lead.

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The Courts of Mines and the Supreme Court have concurrent jurisdiction on these subjects, and so far as the Courts of Mines decide cases, their decisions cannot be altered or varied by the Supreme Court, by way of review, for error, or on further discovery of evidence ; and as to cases pending in the Court of Mines, their pending, if relied upon, should stop the jurisdiction of the Supreme Court on the same subject. But the peculiarity of this case is, that the very decree made the result of the former suit not final, if further discoveries showed that the gold in question was on the Golden Point Lead ; and if such discovery were made so as to open the question, I think the two courts would again be placed in the position of having concurrent jurisdiction, however practically inconvenient it might be to have the subject brought before a new tribunal.

Part of the case distinctly made by this Bill is that discoveries since the decree show the gold to be on the Golden Point Lead. It uses language which might refer to evidence derived from workings before the decree, which, I apprehend, could not be used, and language impugning the legal title of the Defendants to any claim upon the Frenchman's Lead, and denying that the gold

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in question was upon that lead, both which facts, from the description of the former decrees in the Bill, I would take to have been decided in the Defendants' favour. The Bill, then, appears to me on its face to seek some relief which the Plaintiffs cannot get, and to dispute matters which they cannot impugn; but it states facts entitling them to some of the relief sought, and is, therefore, good on a demurrer to the whole Bill.

It has been argued for the Defendant that this Bill seeks to restrain the action of a court of concurrent power, but it does not seek to affect the court but to restrain the parties from proceeding in it, like the ordinary case of a court of equity restraining proceedings upon a judgment at law, or British courts restraining proceedings in foreign or colonial courts. I have not found any precedent of a decree of one court of equity, in precise terms, by injunction restraining proceedings in another; but there is a class of cases partly collected *Mitford*, p. 101, of bills to set aside decrees obtained by fraud, in several of which, as *Kennedy v. Daly* (b), *Gifford v. Hort* (c), and also in *Bandon v. Bercher* (d), the Bill and decree were in different courts, and the relief obtained involved the stopping the Defendants from enforcing their rights under the decree. Such a case was *Larnach v. Alleyne* (e) before our courts, as to proceedings in New South Wales, and on this subject affirmed on appeal.

The present Bill is objectionable in not showing distinctly whether the Plaintiffs seek to impugn the proceedings in the Court of Mines, as wrong upon the evidence then presented; or merely to avail themselves of the reservation in the decree, and whether they seek to adduce further evidence of facts before the decree; but indistinctness is not a ground of demurrer relied upon.

(b) 1 Sch & Lef., 355.

(c) *Ib.*, 386,

(d) 3 Cl. & Fin., 510.

(e) 1 W. & W., Eq., 342.

In *Perry v. Phillips* (f) Lord Eldon seemed disposed to hold that there could not be a bill of review coupled with a prayer of review, &c., only, if the Court held the former decree right, upon the ground that in the review aspect the leave of the Court to filing it should be obtained; but the decision of the full Court in the present case, that when the proceeding of review is in a different court, leave is unnecessary, would appear to give an answer to that view of the difficulty.

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On the whole, I think that, as the Plaintiffs make a case for part of the relief prayed, the demurrer should be overruled, with costs. I give the Defendant company demurring a month's time to answer.

(f) 17 Ves., 176.

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A PLEA put in to the information and bill in this suit, was overruled on appeal (g). No time for answering was fixed by the Court in delivering judgment, and no application was then made for time to answer, although the time for answering had elapsed. The Plaintiffs thereupon set the cause down as undefended. The Defendants afterwards applied by summons for further time to answer. The summons being unsupported by any affidavit of a defence upon the merits, was dismissed without prejudice to a renewal of the application. The Defendants imme-

February 26.

A plea having been overruled, the time for answering having elapsed, and the defendants not having obtained further time to answer, the plaintiff set the cause down as undefended.

On motion to set aside the setting down, as irregular,

Held, that the obtaining time to answer, is the privilege of the defendant, and not the duty of the plaintiff; that no time having been obtained by the defendants, the plaintiff might either set the cause down as undefended or apply for an attachment for want of an answer; and motion dismissed, with costs.

(g) *Vide ante*, Vol. V., Eq.

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diately afterwards served the Plaintiffs with a notice of motion, "that the roll filed be taken off the file, and the setting down of the same be set aside with costs, on the ground of irregularity." The above facts appeared upon affidavits in support of, and in opposition to, the motion.

Argument.

Mr. *Billing*, Mr. *Holroyd*, and Mr. *A'Beckett*, for the motion. The Defendants having put in a plea, the Plaintiffs can only set down the cause as undefended under Supreme Court Rules, cap. vi., sec. 7. Section 11 is only applicable where no plea, demurrer or answer, has been put in. Section 7 does not allow the bill to be so set down until after default in answering within "the time named by the Court or a judge." After plea overruled, the time so named is, in effect, substituted for the time for answering fixed by section 6, and until the time is named, there is no obligation to answer. Here no time for answering has been named by the Court or a judge, and therefore there has not been the default necessary to setting down the cause as undefended. It has always been the practice for the Court overruling a demurrer or plea, to fix the time for answering, *Fairbairn v. Clarke* (h). The omission in this instance, should have been supplied on the Plaintiff's application.

Mr. *Bunny*, Mr. *J. W. Stephen*, and Mr. *Webb*, *contra*. The Defendants, by this notice of motion, treat the setting down of the cause as an irregularity, and as such it may be waived by the opposite party taking a subsequent step in the cause. The Defendants have taken this step by the summons for further time, which has been dismissed. The Supreme Court Rules should be interpreted by analogy to English practice; and under that practice, after plea overruled, the Plaintiff may insist upon an answer, but the Defendant cannot answer without leave. The Plaintiff need not apply for a time to be named for answer-

ing, unless he requires an answer. By setting down the suit as undefended, he waives his right to discovery. As the plea has been overruled, it amounts to no plea; and the Defendants having neither demurred, pleaded, nor answered, are within rule 6, though they might have applied for further time, as an indulgence under rule 7. The time named in the summons having expired when the plea was overruled, and no further time having been asked, the Plaintiffs were at liberty to set the suit down at once as undefended.

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Mr. *Billing* in reply. The Supreme Court Rules must be read as part of the Statute under which they were framed, and a failure to comply with them cannot be cured by waiver, *Pilkington v. Himworth* (j).

MR. JUSTICE MOLESWORTH:—

Judgment.

In this case, I think we may fairly call in aid, for the construction of the Rules, the schedule shewing the form of writ to be endorsed upon the bill: "We command you (and each of you) that within [blank] days after service hereof on you, exclusive of the day of service, you do deliver an answer to the Plaintiff's bill on the other side written, otherwise, you will be taken to have confessed the matter therein contained, and the decree of the Court will be entered against you without further notice." In the first instance, this apprises the party as to what he may be subject to if he does not answer. The Rules afterwards fix the time within which parties are to demur or plead, and the time for demurring or pleading is so much shorter than the time for answering, that it may very well occur that a demurrer or plea may be disposed of while the time to answer is still running. If a demurrer or

(j) 1 Y. & C., Ex., 612.

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The question is simply, whether the rule of practice requiring that before a bill of review, or a bill in the nature of a bill of review, is filed in a Court of Equity in England, the leave of the court in which the original suit was instituted must first be obtained, applies to courts of co-ordinate jurisdiction.

It is said that by analogy the rule that the leave of the Court must be obtained in cases in which two suits are instituted in the same court, should be extended to courts of co-ordinate jurisdiction. But in my opinion the argument fails; for the reason why the leave of the court must be obtained where the two suits are in the same court is, that there must be an end to litigation. In cases where bills of review are filed, the leave of the court to file them is necessary, not because the court wishes to interfere with the rights of the suitor, but because it ought to be satisfied that the bill is one of review, and not one merely to agitate a question which has

(c) T. & R., 319.
 (d) 3 Atk., 350.

(e) 5 H. L. Cas., 383.
 (f) 2 Ph., 655.

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The decision appealed against is also in direct violation of the principle, that the jurisdiction of no court is to be abridged in any other way than by express statutory enactment. This decision abridges the jurisdiction of the Court of Equity; it stops the proceedings in the bud. The case is not heard and disposed of by plea or demurrer; but the Court declares that it will not entertain the cause, because a similar suit was heard by a court of co-ordinate jurisdiction.

Nothing that I have said is to be taken as expressing an opinion, directly or indirectly, whether a plea of the decree of a court of co-ordinate jurisdiction, would be an answer to such a bill as this. The Court cannot, in the summary way proposed of setting aside this bill, abridge the jurisdiction of this Court—a jurisdiction which we are bound to maintain, and which, as I have said, cannot be abridged unless by express statutory enactment. The appeal will therefore be allowed. The order pronounced below will be set aside; and the Appellant allowed the costs below of

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April 13.

DOUGLASS v. SIMSON.

N. & K., traders in partnership, being indebted to *D.*, executed a bill of sale, to secure the antecedent debt, and a further sum paid on its execution. Within sixty days thereafter, the estate of *N. & K.* was sequestered. Upon bill by *D.* against the assignees in insolvency of *N. & K.*,

Held, that notwithstanding the bill of sale was, in the opinion of the Court, executed *bond fide*, and without intent to prefer *D.* to other creditors, yet it was void within the

"*Insolvency Statute*" (No. 273), sec. 31; but so far only as it was a security for a pre-existing debt.

In construing Acts of Parliament, Judges are bound to follow the distinct language of Acts, without regard to their policy; where language is indistinct, then with regard to policy; and only where the literal distinct meaning of words is absurd, to break through it.

Colonial Judges should consider themselves concluded by an express decision of the Privy Council; and should receive their dicta as entitled to very great respect, but not as conclusive.

Bank of Australasia v. Harris [15 Moo., P. C., 97], and *Nunes v. Carter* [L. R., 1 P. C., 342] observed upon.

Affidavit, verifying the residence and occupation of the attesting witness to a bill of sale, as follows, "I reside at Geelong, and am a law clerk," held sufficient under the Act No. 204, sec. 56.

NEWBERRY and *KELLY*, trading in partnership, executed, on December 3rd, 1866, a bill of sale to the Plaintiff, of printing machines and other scheduled chattels, to secure payment, by instalments mentioned therein, of a sum of £702 11s. 1d., of which £150 was advanced at the time, the balance being a then existing debt. Default was made in payment of the instalment due January 13th, 1867, and thereupon the Plaintiff, on January 25th, took possession of all the goods comprised in the bill of sale, and also of a quantity of paper and other goods placed in the hands of *Newberry* for sale on account of the Plaintiff. *Newberry* and *Kelly* voluntarily sequestered their estate on the following day, January 26th, 1867, and *Simson* was appointed official assignee of the estate. He claimed the whole of the goods taken possession of by the Plaintiff; and it was ultimately agreed that the same should be sold, and the proceeds lodged in a bank in the joint names of the Plaintiff and *Simson*, to abide the event of an action. £684 1s. 1d. the proceeds of the sale, was accordingly lodged in the English, Scottish, and Australian Chartered Bank. Subsequently *Levey* was appointed trade assignee.

The present suit was instituted against the official and trade assignees and the Bank; alleging that the assignees refused to take any proceedings to try their right, and that the Plaintiff was unable, without suit, to obtain the proceeds which he claimed, and praying payment to the Plaintiff of the money in the Bank.

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Statement.

The material facts were admitted by the assignees, Defendants; but they insisted that the bill of sale was invalid on the following grounds:—That at its date *Newberry* and *Kelly* were insolvent, or were thereby rendered insolvent, and that it was given without valuable security. That it comprised the whole of their property with a trifling exception, and purported to secure a sum then due; and that if any such sum was actually due, the bill of sale was in contemplation of insolvency, or with intent to prefer the Plaintiff as a creditor. That it was given within sixty days of the date of sequestration, and had the effect of preferring the Plaintiff; and, that it was not properly registered.

The circumstances under which the security was given, are detailed in the judgment. The attesting witness to the bill of sale, in the affidavit required by section 56, part VII., of the "*Instruments and Securities Statute*," described himself as follows: "I reside at Geelong, and am a law clerk."

Mr. *J. W. Stephen* for the Plaintiff. The description of the attesting witness to the bill of sale, is sufficient: *Golf v. Everard* (l), *Briggs v. Bass* (m). Imperfect registration would be immaterial in this case, as the chattels were in the mortgagee's possession when the order for sequestration was made. There is no case of fraud upon the facts. £150 was actually advanced at the time. There was no intention to prefer, and no fraudulent preference within the English cases. There being no fraud, section 31 of the

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(l) 2 Hurl. & Colt., 1.

(m) L. R., 3 Q. B., 268.

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"*Insolvency Statute*" has no operation, although the bill of sale was within sixty days of the sequestration: *Bank of Australasia v. Harris* (n), *Nunes v. Carter* (o). If these cases cannot be held to be express decisions upon the point, they shew, beyond doubt, how the point would be decided by the Privy Council if it came before them, and are binding upon this Court. Whatever the decision may be as to the security for the antecedent debt, the security is good for the £150 advanced at the time.

Mr. *Laues* for the Defendants, *Simson* and *Levey*. The registration of the bill of sale is bad for the vague description of the attesting witness: *Nathan v. Naylor* (p). The facts amount to fraud, which would vitiate the transaction at common law, independently of any statutory objections. It would be deemed a fraudulent preference under the English bankrupt law: *Woodhouse v. Murray* (q), *Graham v. Chapman* (r), *Ex parte Foxley* (s). It is also bad under section 81 of the "*Insolvency Statute*," as a preference within sixty days of the order of sequestration. This Court is not bound by the dicta of the Privy Council, and if it differs with the view taken by the Privy Council, is bound to act upon its independent construction of the statute in the absence of express decision. That course was taken in New South Wales, notwithstanding *Bank of Australasia v. Harris*, and *Nunes v. Carter*, which were not followed in *Humphrey v. McMullen* (t). Section 119 of the "*Insolvency Statute*," as to deeds of assignments, invalidates transactions within sixty days of the date of the deed, independently of any fraudulent intention, and it is unreasonable to attribute a less stringent operation to an order for sequestration than to a voluntary deed. Part of the consideration given for the bill of sale, is clearly bad as an antecedent debt, and vitiates the whole consideration;

(n) 15 Moore, P. C. C., 97.
(o) L. R., 1., P. C. C., 342.
(p) *Ante* Vol. I., Law, 268.
(q) L. R., 2, Q. B., 634.

(r) 12 C. B., 85.
(s) L. R., 3., Ch. App., 515.
(t) 7 N.S.W. Reps., 84.

Jacomb v. Donovan (v). The transaction must be treated as a whole, and cannot be held partly bad and partly good ; it is bad altogether.

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Argument.

Mr. *Holroyd* for the Defendant, the Bank, asked for costs.

Mr. *J. W. Stephen* in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

April 18.
Judgment.

The bill in this case is by the Plaintiff, Mr. *Douglass*, against the official and trade assignees of Messrs. *Newberry* and *Kelly*, and a bank with which certain money in dispute was deposited to abide the result of litigation.

The Plaintiff, in Geelong, used to receive goods, stationery, &c., from an English firm—*Wrigley, Son, and Boulton*—and sell them in Victoria upon a *del credere* commission. *Newberry* had been in the Plaintiff's employment in this business, but started in a stationer's shop in Melbourne in partnership with *Kelly*. *Newberry* and *Kelly* were principally supplied with such goods from plaintiff, selling as above ; the plaintiff used also to send some such goods, opened cases, to *Newberry* only, to sell on commission at the partnership premises. On or about December 3, 1866, *Newberry* and *Kelly* were indebted for such goods sold £552 16s., secured by acceptances of bills, drawn by Plaintiff, on behalf of the English firm, upon them—£71 19s. 6d., payable January 13, 1867 ; £413 16s. 7d., payable February 20, 1867 ; and £67 10s. unsecured ; and had difficulty in meeting their current liabilities, and applied to the Plaintiff to advance them £150 to meet them. They handed him a statement of their affairs,

(v) *Ante* Vol. I., Eq., 66.

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showing assets—debts due to them, £412 1s. 9d.; a debt due from himself to *Newberry* for commission, £60; cash in bank, £141; stock and plant, £1,143 10s.; in all £1,588 13s. 6d.; liabilities—bills payable and open accounts, including debts to Plaintiff, £1,402 5s. 6d. It does not appear that Plaintiff knew this account was untrue; it really was, in exaggerating the value of the assets, stock, and plant about £300; so that they really were insolvent, without regarding probable bad debts, for more than £100. Their bargain for an advance was concluded by a bill of sale dated December 3, 1866. It recited £702 16s. 1d. as then due by *Newberry* and *Kelly* to Plaintiff, transferred to him all their printing plant and stock-in-trade on their premises, and which might be brought there, to hold as his own, subject to redemption on payment of £702 16s. 1d., by instalments—£71 19s. 6d., January 13, 1867; £413 6s. 7d., February 4, 1867; £60, March 4, 1867; £157 10s., June 4, 1867—with covenant for payment, provisions for enforcement, &c. *Newberry* and *Kelly*, according to *Kelly's* evidence, struggled against the bill of sale being at once registered, said they only hoped to carry on business by obtaining renewals of pressing bills, which they could not if their credit was injured, and they could hardly carry on at any rate. This the Plaintiff contradicts. The £150 was to be applied to pressing demands. Plaintiff says he then insisted that the £60 due to *Newberry* for commission was to be applied to their future current account, not the payments under the bill of sale. The registry of the bill of sale was not unnecessarily delayed, but the Plaintiff's solicitor told *Newberry* and *Kelly* that the necessary delay of its registry would be enough to enable them to effect the proposed renewals. *Newberry* and *Kelly* afterwards carried on business, buying and selling; the Plaintiff continuing to supply goods and send goods for sale on commission as before—the former to the extent of about £100, the latter so that goods which produced £140 by auction were on the premises when the sale afterwards occurred. The bill

£71 19s. 6d., payable January 13, 1867, was dishonoured, Plaintiff refusing to allow credit against it for the commission due to *Newberry*, then £65 10s. 6d.; and the Plaintiff immediately proceeded to seize all the goods on the premises, partly as under the bill of sale, and partly as sent only for sale on commission, and upon this *Newberry* and *Kelly* called a meeting of their creditors, and advised by it, sequestrated their estate as insolvent January 25, 1867. It was subsequently agreed between the Plaintiff and official assignee that the goods seized should be sold, and the proceeds placed in bank to their joint credit. They were sold for £671 1s. 1d. clear, which was deposited accordingly.

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—
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Some efforts were made to determine the rights of the Plaintiff and Defendants by less expensive means, which failed, and at last this suit was commenced, the principal question in which is the validity and efficacy of the bill of sale December 3, 1866.

An objection to it is, that the affidavit under which it was registered does not sufficiently particularise the residence and occupation of the attesting witness under the Act No. 204, sec. 56. By the affidavit in its sworn part the witness says—"I reside at Geelong, and am a law clerk;" and that was true. I think that was enough, on the authority of *Briggs v. Bass* (w).

The bill of sale is next assailed as fraudulent, and therefore an act of insolvency under No. 273, sec. 13; and with reference to it I have been referred to various English cases, in which it has been held that conveyances of traders parting with nearly all their stock-in-trade, so as to necessitate stoppage of business, &c. (some, in facts, very like the present) were held fraudulent under the bankrupt Acts. It has, I believe, been always held here, and I have

(w) L. R., 3 Q. B., 268.

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several times held, that fraudulent alienations, &c., under that section, were those only fraudulent at common law. The foundation of the English cases was their Acts, speaking of fraudulent conveyances, &c., whereby creditors might be defeated or delayed from the recovery of their just debts; and the latter words, as to effect, being held explanatory of the former. Besides, the English bankruptcy Acts related solely to traders whose means of payment were altogether or principally traffic; ours related also to persons not traders, whose means of payment were principally labour, &c. There was a variety of cases also in England in which transactions, preferences, &c., were avoided as contrary to the spirit of the bankrupt Acts, without any express prohibitions, to some of which I have been referred. Our Legislature sought to substitute express statutory provisions instead of these implied prohibitions. I think we should be guided by its provisions only.

It was objected to this bill of sale that the Plaintiff had personally no demand against *Newberry* and *Kelly*, but I think as an agent he might take the security to himself not referring to his principals. Besides, his position as an agent selling on *del credere* commission, gave him an interest beyond an ordinary agent.

The bill of sale untruly states the consideration as an entire previous debt as if unsecured, the real consideration being an advance, and debt partly secured by current negotiable bills. This untruth might be a material ingredient for coming to the conclusion that the bill of sale was a fraudulent scheme. As to the practical hardship of *Newberry* and *Kelly* being subjected to pay the debt twice by the holders of bills and by the bill of sale, it might be avoided by requiring the bills to be given up before the amount was levied under the bill of sale. The effect of the transaction, according to the evidence, was to

give *Newberry* and *Kelly* £150 in hand, besides £141 in bank, leaving them their book debts untouched, their stock-in-trade to be used for sale to customers until Plaintiff interposed, thus considerable probability of getting time from creditors—I think I may add, with a reasonable expectation that the Plaintiff would not use his power rigidly if their affairs seemed prosperous. The Plaintiff paid £150, increasing the debt to him or his principals, and got in return a new security for it and previous debt, and drove, I think, a hard bargain. The transaction indicated that both parties saw considerable probability of approaching failure or sequestration, but I think not a certainty of either. I think they both hoped that *Newberry* and *Kelly* could carry on, and the debts to Plaintiff and other creditors be at some time paid. The Plaintiff furnished them goods without security afterwards, before the seizure, to the extent of £100. I think, from the whole evidence, that *Newberry* and *Kelly* really acted as for the benefit of themselves, not of the Plaintiff—not to put him before their other creditors; that they originated the transaction in order to get the present relief of £150; and that the bill of sale was based on a real bargain, not a scheme.

According to this view of the facts, this case presents the much-disputed question of law, whether a transfer, which gives advantage to one creditor over others, made by a person who is insolvent at the time, or within sixty days of the sequestration of his estate, is avoided by section 31 of No. 273, our consolidated Insolvent Act. That Act seems to me, generally, as to facts about insolvents, connected with dates, motives, and results, carefully to distinguish the combinations producing prescribed consequences. As to acts of insolvency, section 13 makes them absence from Victoria, or from residence, &c., with the motive of delaying creditors, not pointing out property to satisfy execution, &c., when required, coupled with certain

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evidence of no property found, fraudulent alienations, &c., of property, or giving fraudulent warrant whereby property may be affected, the word "fraudulent" including motives. Section 21, at its close, shows that all the statutory avoidances of insolvent's acts are dependent upon there being a supported order for sequestration. This was decided—*Braithwaite v. Pascoe* (x).

Section 29 makes every alienation, &c., or warrant of attorney, made by any person then actually insolvent, or thereby rendered insolvent, (the result) without valuable consideration, to be treated as fraudulent and void. Section 30 makes alienations, &c., by a person after he has contracted a debt, and within a year of an act of insolvency, or of a sequestration, or of his being actually insolvent, without valuable consideration, liable to be set aside by any creditor prior to the alienation, &c., so far as the alienation, &c., would prevent such creditor, &c.

Then comes the debated section, 31, "All alienations transfers gifts surrenders deliveries mortgages or pledges of any estates goods or effects real or personal warrants of attorney cognovits actionem and judgments entered up thereon made by any person being insolvent or in contemplation of surrendering his estate as insolvent or knowing that legal proceedings for obtaining an order for the sequestration of his estate as insolvent have been commenced or within sixty days preceding the making of any order for sequestration of his estate as insolvent and having the effect of preferring any then existing creditor to another shall be and are hereby declared to be absolutely void." Here we have four alternatives:—1, being insolvent, a mere fact; 2, in contemplation of surrendering his estate as insolvent, a motive (and as to which I would notice that a man not insolvent may contemplate future liabilities, damages, &c., which may lead

(x) 5 Shad. (1850), 28.

to surrendering); 3, knowing that legal proceedings, &c., a fact known to him; 4, within sixty days preceding order of sequestration, a fact coupled with a date—all four alternatives made dependent upon a result—having the effect of preferring (carrying before) any then existing creditor to another. “Having effect,” of course, means “which, if not avoided would have the effect;” and the plain meaning of the words points, not to the motive of the transferor, but to the result of the transfer. As to the first of these alternatives—being insolvent—it relates to a state of facts hard to be ascertained, and which may continue for a long time; and I am not disposed to praise the policy of the legislation. As to the last alternative, subjecting creditors who obtain such attempted advantage within a short period of sequestration to be brought back to an equality with other creditors, it seems to me very useful, preventing a common class of frauds being attempted, and defeating them when attempted, with diminished subject for litigation and chance of success for perjury. The utility of such provisions is recognized in the judgment in *Nunes v. Carter* (y). As to construing the clause, I think Judges are bound to follow the distinct language of Acts, without regard to their policy; where language is indistinct, then with regard to policy; and only where the literal, distinct meaning of words is absurd, to break through it.

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The 32nd section provides as to sub-assignees of persons taking assignments, &c., under the last sections, that they shall be protected if taking lawfully and *bona fide*, making a just price an additional test of *bona fides*, showing that its framers were quite alive to the distinction between *bona fides* and *mala fides*, and made it expressly where they intended it. The section then provides, somewhat harshly, that the first assignee shall be responsible for the true value, not the price he got, to the creditors. The 33rd

(y) L. R., 1 P. C., 349.

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section avoids alienations, &c., in reference to time, between sequestration and certificate. The 34th section avoids acquittances, &c., of debts by insolvents without payment actually received made by a person being insolvent, or in contemplation of surrendering, &c., or knowing that legal proceedings, &c., after such order of sequestration, or within sixty days before making it; facts and time subject to result, the effect of depriving his creditors of the benefit of the debt. Passing to the 35th section—by it “all payments made to any creditor by any person not compelled by legal process to make the same and knowing himself to be insolvent or in contemplation of surrendering his estate as insolvent or knowing that legal proceedings for obtaining an order for sequestration of his estate as insolvent have been commenced or that any such order has been made shall be and are hereby declared to be fraudulent.” If the section were left so it would give payments an advantage as to protection over transfers in case they were procured by legal process, in case the insolvent were ignorant of his insolvency, or of an order of sequestration, and in the total omission of the retrospect of sequestration for sixty days. Then follows a sentence, “But all payments really and *bona fide* made by any insolvent to any creditor before any order made for the sequestration of his estate is known to the insolvent or such creditor shall be valid.” This extends the protection to payments further, if they be really *bona fide* made, both payer and receiver being ignorant of the sequestration order, though there is no legal process, though both are aware of the insolvency and of proceedings taken. This latter sentence is adversative, cannot be taken to be merely explanatory of the former; we cannot infer from it that the former alone would protect payments really and *bona fide* made; much less can we employ this latter sentence for the interpretation of the 31st clause, and say that *bona fides* shall protect transactions which its express terms would avoid. The framers of the Act obviously

intended to legislate about transfers, &c., and payments, in a very different manner, and with very good reason. A man selling his goods, or paying his debts with money, is carrying on business in its ordinary course, doing nothing to excite suspicion of his insolvency. As soon as he satisfies debts by transfers, he should at once excite such suspicion, and the transferee suffers comparatively little hardship, in being deprived of his advantage, and reduced to the level of other creditors. There are some goods usually treated as cash in making payments, and as to the transfer of them they should perhaps be held to come under the term "payment" in the Act.

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Passing to authorities. In *Jones v. McKenzie* (z), one *M'Diarmid*, in the colony of New South Wales, mortgaged to *Jones & Co.*, by deposit of title deeds, on the 22nd February, 1856. In March, 1857, his estate was placed under sequestration in Sydney, and *M'Kenzie* appointed official assignee. The case was tried on affidavit, and *M'Kenzie* stated that *M'Diarmid* was insolvent when he made the mortgage. An affidavit for *Jones & Co.* stated that *M'Diarmid*, being indebted to them, wanting further credit, applied for goods to them, and agreed to give security for the past debt if they would give them, and that the mortgage was in pursuance of that agreement and further goods given; that *M'Diarmid* then represented himself to be in solvent circumstances, and *Jones & Co.* believed him; and that *M'Diarmid*, in an insolvency examination, stated that he, at the time of the mortgage, believed himself to be perfectly solvent. The Court at Sydney doubted as to the sufficiency of the evidence of the insolvency, but the majority being satisfied, made an order avoiding the mortgage. *Jones & Co.* appealed to the Privy Council. The members of the Judicial Committee held that the mortgage transaction was a perfectly *bona fide* one, but held that the evidence of insolvency was insufficient,

(z) 13 Moore, P. C. C., 1.

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and thereupon sent the case back to Sydney to proceed further in the matter. If the members composing it held that the transaction was protected by *bona fides*, they should have decided at once for *Jones* and sent nothing back. So I regard that case as a decision. The point perhaps was not argued, I should think was not, for the case does not appear to have been adverted to in the *Bank of Australasia v. Harris* and *Harris v. Bank of Australasia* (a), heard by judges partly the same. Those two cases, arising out of the same transaction, came from Queensland upon the same Act. They turned upon an indorsement, complete at all events, 11th July, 1859, of a bill of exchange to a bank creditor by a firm which stopped payment 5th July, and whose estate was sequestrated 12th September—more than sixty days after 11th July. The litigation was between the bank, as indorsees of the insolvent, and the acceptors, the official assignee not being a party, nor appearing to have made any claim. The facts are very confused as to law pleadings and directions to juries. I consider it unnecessary to set them out, but the members of the Judicial Committee who heard it, and expressed an opinion upon the Act in question, decided in favour of the bank upon other grounds, stating, as their strong opinion upon the construction of a section from which our section 31 is copied, that the words "having the effect of preferring any then existing creditor to another," reading that section in connexion with the rest of the Act, indicated fraudulent preference, and were not intended to apply to any case of preference not fraudulent. The next case to which I have to advert was before other members of the Judicial Committee upon the construction of a Jamaica insolvent statute, *Nunes v. Carter* (b). In that case the court held that a transfer to a creditor was avoided by being within six months of insolvency, although there was no evidence of any fraudulent preference. The Jamaica Act is so unlike ours that

(a) 15 Moore, P. C. C., 97-116. (b) L. R., 1 P. C. C., 342.

it would be useless to examine the case as in itself an authority, but the then members of the Judicial Committee deciding it, referring to the *Bank of Australasia v. Harris*, stated that they had no doubt of the correctness of that decision. I do not think that they were led to consider that case carefully before expressing that opinion, they spoke of a *dictum* regarding a person transferring, when in fact insolvent, as a decision regarding a person transferring within sixty days of sequestration. I think colonial judges should consider themselves concluded by any express decision of members of the Judicial Committee of the Privy Council, and should receive their *dicta* as entitled to very great respect, independent of their personal character (which in this instance, I need hardly say, stands very high); but not as conclusive. One reason for inferior judges acting upon the expressed opinion of those to whom an appeal lies from them, namely, that deciding contrary to that opinion would be merely inflicting the costs of an appeal, is less strongly applicable to opinions of the judges on an appeal to the Privy Council, from the constant variation in the persons sitting to hear appeals. The Supreme Court of New South Wales, notwithstanding the opinions expressed in the *Bank of Australasia v. Harris*, continues to act on its former views, and notwithstanding *Nunes v. Carter*, down to *Humphrey v. McMullen* (c). I have omitted to repeat valuable reasons for the judgment expressed in that case.

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—
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An argument of considerable weight against the sixty days provision being applicable only to fraudulent transfers, which was presented to us in *Courtney v. Wilson* (d), does not appear to have been presented to the Privy Council judges, in the *Bank of Australasia v. Harris*, derived from the Act 5 Vic., No. 9, authorising assignments to trustees for creditors, passed a few months before 5 Vic., No. 17, namely, that by the

(c) 7 N.S.W. Reps., 84.

(d) *Ante* Vol. I., Law, 110.

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former, section 37, "every assignment or delivery, or sale of goods by a debtor for or on account of or in satisfaction or part satisfaction or as security of or for any antecedent debt due to any creditor such assignment &c. being within sixty days preceding the date of the first publication of notice of the execution of the deed of assignment shall as against the creditor having signed such deed or who shall afterwards sign the same be and be adjudged and taken to be fraudulent and void and all such goods as last aforesaid or the true value thereof in case of any sale or transfer to a third party may be recovered accordingly by the trustees in such deed named from the creditor having taken the same for the benefit of all the creditors." The argument was urged on the principle that statutes on the same subject should be construed together. That section No. 37 is now incorporated in our consolidated Insolvent Act, section 119, and may be used on the more stringent principle that all the clauses of an Act are to be regarded in its construction; and it is certainly an improbable intention to attribute to our Legislature that the publication of notice of a deed of assignment should have a greater effect to avoid a transfer retrospectively than a voluntary or compulsory sequestration.

On the whole, I am prepared to hold in the present case, that the sequestration of 26th January, 1867, avoided the bill of sale of 3rd December, 1866, but so far only as it was a security for a pre-existing debt, not as to the £150 then advanced as a consideration. The words of section 31, I think, allow that latitude. It would be otherwise as to a deed avoided for actual fraud. I intimated that as the £150 was applied to paying existing debts, the security might be avoided as to it also, for giving them a preference. As to that I now think otherwise. *Newberry* and *Kelly* got the money to employ at their discretion, and the Plaintiff was not, in this respect, responsible for its being

employed so as to give some creditors an advantage. I think the Plaintiff is also entitled to £140, the proceeds of goods sent to *Newberry* for sale on commission, subject to a deduction for £65 10s. 6d., the debt due by him to *Newberry* for selling on commission. These two subjects were connected, and I do not think his evidence enough to warrant the £65 10s. 6d. being applied to any other account. I think the amount in debate so small, that I shall be warranted in decreeing payments without accounts, under rule 10, chap. vi.

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—
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"Declare that the Plaintiff is entitled, subject to the costs hereinafter decreed, to the sum of £150, being the advance made by him on or about the 3rd of December, 1866, to *Newberry* and *Kelly* in the bill mentioned, with interest thereon at the rate of ten per cent. per annum from the 4th day of June, 1867, when the same was payable under the bill of sale dated the 3rd of December, 1866; that he is also entitled to the sum of £140, being the proceeds of goods placed by him for sale in the hands of the said *Newberry* in the bill mentioned, deducting thereout the sum of £65 10s. 6d., payable by him to the said *Newberry* for commission, leaving £74 9s. 6d., with any interest, payable to the Defendants by the English, Scottish, and Australian Chartered Bank, in respect of the said balance, £74 9s. 6d., as lodged with it. Declare that the Defendants, *Simson* and *Levey*, are entitled, subject to the costs hereinafter decreed, to the balance of the sum, £63 1s. 1d., lodged in the said bank to the credit of Plaintiff and Defendant *Simson*, with interest, if any, payable by the said bank. Declare that the said bank is entitled to be paid its costs of suit. Refer it to the Master to tax the same. Direct that the said bank may deduct one moiety of the said costs from the sum hereby made payable to the Plaintiff, and the other moiety from the sum hereby made payable to the said Defendants, *Simson* and *Levey*, and shall pay the balance of the said sum to the said parties respectively. This decree to be without prejudice to the right of the Plaintiff to prove against the insolvent estate and estates of *Newberry* and *Kelly*, for claims not hereby provided for, and to questions of deduction or set-off against the same not hereby disposed of. Make no order as to the costs of Plaintiff, and of Defendants, *Simson* and *Levey*. Liberty to apply."

Decree.
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NOTE.—See *Contra*, *Simson v. Aitken*. Per Sup. Ct., Vic., in *Banco*—*Infra* Law, 59.

1869.

DOUGL

St

HOYLE v. EDWARDS.

March 22
April 12
A. between
vendor and
mortgagee
the Plaintiff
is un-
represented.

Scumble, that
where a wife
joins her
husband in a
mortgage to
bar dower, the
deed not
clearly indi-
cating her
total renounce-
ment of dower
in his favor,
she is entitled
to redeem the
mortgage.

SUIT by vendor against purchaser for specific perform-
ance of a contract for the sale of land in Melbourne. The
Plaintiff was mortgagee of the land, with power of sale.
Default having been made by the mortgagor, the Plaintiff
caused the land to be put up for sale by auction, on the
3rd September, 1868, subject to certain conditions of sale,
which, so far as material to this suit, are fully stated in
His Honor's judgment. The Defendant became the pur-
chaser at the sale, for the sum of £600; signed a contract
of purchase, subject to the conditions of sale; paid £300
in cash, and accepted the vendor's draft for the balance of
the purchase money, and interest, at six months after date.

The land sold was, on 18th January, 1841, granted by the
Crown to *S. J. Brown*, who was married before 1st Janu-
ary, 1837. On 22nd September, 1842, a mortgage deed
was executed between *S. J. Brown* and *Eliza* his wife of
the one part, and *U. Pohle* of the other part, whereby *S. J.*
Brown granted, bargained, sold, and released, and *E.*
Brown remised and released, unto *Pohle* (*inter alia*) the
land in question, subject to a proviso for redemption,
that upon payment by *Brown*, his heirs, executors,
administrators, or assigns, to *Pohle*, his executors
or administrators, *Pohle*, his heirs or assigns, should
convey or assure the land in such manner as *Brown*, his
heirs, executors, administrators, or assigns should direct.
This deed was duly executed and acknowledged by *Mrs.*
Brown. By an indenture of the 18th June, 1844, between
S. J. Brown of the first part, and *Pohle* of the second part,
and a dower trustee of the third part, after reciting the
mortgage of 1842, and that the principal money thereby
secured, with an arrear of interest, was then due upon
the mortgage, *Brown*, in consideration of such principal

money and interest, granted and released to *Pohle*, on the common dower uses, all the land mortgaged, freed from all equity of redemption under the mortgage. The subsequent title was then traced from *Pohle* to the Plaintiff, as mortgagee of one *White*.

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v.
EDWARDS.
—
Statement.

On the 11th September, 1868, the Defendant's solicitors delivered to the Plaintiff's solicitors certain requisitions upon the title (*inter alia*).—" (5) We require the right to dower of the wife of the Crown grantee, *S. J. Brown*, to be properly released." On the 15th September the Plaintiff's solicitors replied (*inter alia*).—" (5) This has evidently been released by the mortgage to *Pohle*." On the 18th September the Defendant's solicitors wrote insisting on the objection, and also on other minor objections raised by the requisitions and subsequently removed by the vendor's solicitors, and concluded—" Subject to the above we accept the title, and are ready to pay cash and complete the matter." The Plaintiff's solicitors, on the same day, replied—" We fear that we shall be unable to comply with your 5th requisition. The conveyance from *Brown* is now twenty-four years old, and Mrs. *Brown's* contingent right to dower over the equity of redemption must be small indeed, and it will be for you to consider whether the requisition is worth insisting on." On the 23rd September the Defendant's solicitors wrote to the Plaintiff's solicitors that the purchaser declined to take the title, and requesting the return of the £300 deposit, and the cancellation of the contract. On the same day the Plaintiff's solicitors wrote the Defendant's solicitors—" Our client will comply with your 5th requisition, and obtain a release of Mrs. *Brown's* right to dower;" in reply to which the Defendant's solicitors wrote—" Your answer of this date is too late, Mr. *Edwards* having decided not to take the title, owing to the defects existing on same." On the 25th September the Defendant's solicitors wrote the Plaintiff's solicitors—" Under the contract the purchaser is entitled to

1869.

March 22.

April 13.

As between vendor and purchaser, a doubt upon a title makes it bad. The Court will not solve such a doubt, in a suit by the vendor for specific performance, in which the person having the doubtful claim is unrepresented.

Semble, that where a wife joins her husband in a mortgage to bar dower, the deed not clearly indicating her total renouncement of dower in his favor, she is entitled to redeem the mortgage.

HOYLE v. EDWARDS.

SUIT by vendor against purchaser for specific performance of a contract for the sale of land in Melbourne. The Plaintiff was mortgagee of the land, with power of sale. Default having been made by the mortgagor, the Plaintiff caused the land to be put up for sale by auction, on the 3rd September, 1868, subject to certain conditions of sale, which, so far as material to this suit, are fully stated in His Honor's judgment. The Defendant became the purchaser at the sale, for the sum of £600; signed a contract of purchase, subject to the conditions of sale; paid £300 in cash, and accepted the vendor's draft for the balance of the purchase money, and interest, at six months after date.

The land sold was, on 13th January, 1841, granted by the Crown to *S. J. Brown*, who was married before 1st January, 1837. On 22nd September, 1842, a mortgage deed was executed between *S. J. Brown* and *Eliza* his wife of the one part, and *U. Pohle* of the other part, whereby *S. J. Brown* granted, bargained, sold, and released, and *E. Brown* remised and released, unto *Pohle (inter alia)* the land in question, subject to a proviso for redemption, that upon payment by *Brown*, his heirs, executors, administrators, or assigns, to *Pohle*, his executors or administrators, *Pohle*, his heirs or assigns, should convey or assure the land in such manner as *Brown*, his heirs, executors, administrators, or assigns should direct. This deed was duly executed and acknowledged by Mrs. *Brown*. By an indenture of the 18th June, 1844, between *S. J. Brown* of the first part, and *Pohle* of the second part, and a dower trustee of the third part, after reciting the mortgage of 1842, and that the principal money thereby secured, with an arrear of interest, was then due upon the mortgage, *Brown*, in consideration of such principal

money and interest, granted and released to *Pohle*, on the common dower uses, all the land mortgaged, freed from all equity of redemption under the mortgage. The subsequent title was then traced from *Pohle* to the Plaintiff, as mortgagee of one *White*.

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—
Statement.

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HOYLE v. EDWARDS.

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The land sold was, on 13th January, 1841, granted by the Crown to *S. J. Brown*, who was married before 1st January, 1837. On 22nd September, 1842, a mortgage deed was executed between *S. J. Brown* and *Eliza* his wife of the one part, and *U. Pohle* of the other part, whereby *S. J. Brown* granted, bargained, sold, and released, and *E. Brown* remised and released, unto *Pohle* (*inter alia*) the land in question, subject to a proviso for redemption, that upon payment by *Brown*, his heirs, executors, administrators, or assigns, to *Pohle*, his executors or administrators, *Pohle*, his heirs or assigns, should convey or assure the land in such manner as *Brown*, his heirs, executors, administrators, or assigns should direct. This deed was duly executed and acknowledged by Mrs. *Brown*. By an indenture of the 18th June, 1844, between *S. J. Brown* of the first part, and *Pohle* of the second part, and a dower trustee of the third part, after reciting the mortgage of 1842, and that the principal money thereby secured, with an arrear of interest, was then due upon the mortgage, *Brown*, in consideration of such principal

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have his conveyance executed in escrow, and this cannot be done because you are not ready with your title," and again demanding the return of the deposit. The Plaintiff's solicitors, on the same day, replied—"We are prepared to execute the conveyance in escrow whenever tendered to us;" and on the same day the Defendant's solicitors again wrote—"We will send draft if you inform us that the defects are remedied. We wait reply to know this till noon to-morrow." On the 26th September the Plaintiff's solicitors wrote—"In reply to your letter of yesterday, we beg to say that your requisitions have not been complied with, because sufficient time has not been allowed for doing so. We can only repeat that the objections will be removed within a reasonable time." In reply to this the Defendant's solicitors, on the 28th September, wrote—"We have seen Mr. *Edwards*, who declines to wait while the title is being put right, and insists upon a return of the deposit." On the same day the Plaintiff's solicitors replied they were taking steps to remove the Defendant's objections; but on the 1st October the Plaintiff's solicitors wrote the Defendant's solicitors—"In the correspondence between us it seems to have been assumed that Mrs. *Brown* was entitled to dower, and on this assumption we undertook to have the dower released. On further consideration we are satisfied that no such right to dower exists, and the title is perfect as it now stands." Subsequent correspondence ensued between the solicitors upon the point, and on the 15th October the Defendant's solicitors wrote, offering to submit the point to one Counsel to be mutually agreed upon, and that each party should be bound by his opinion. This was declined, and the purchaser having commenced an action against the auctioneers, for recovery of the deposit, this suit was instituted on the 23rd October.

The Bill having stated the contract, requisitions, replies, and the foregoing correspondence insisted "that as

Brown was married before the 1st January, 1837, there was no title to dower in his widow out of the said purchased lands," and prayed for a declaration that the Defendant had accepted the title—for specific performance—for an injunction to restrain the action at law—and that the Defendant might pay the costs of the suit.

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Mr. Forster and Mr. Holroyd for the Plaintiff.—The Defendant, by the letter of the 18th September, 1868, accepted the Plaintiff's title, subject to certain objections therein specified; all of which were removed prior to the institution of this suit, except the one as to Mrs. Brown's dower. This objection is not a valid one, for Mrs. Brown is not entitled to dower. By the mortgage of 22nd September, 1842, *Pohle*, got in the whole legal estate, including Mrs. Brown's dower, which put an end to her right of dower out of the legal seisin. After that, her husband was only possessed of the equity of redemption; and inasmuch as Mrs. Brown was married before 1st January, 1837, she was not entitled to dower out of an equitable interest. In *Banks v. Sutton* (e) it was held that a widow was entitled to dower out of a trust estate, but that case has not since been followed, and has in fact been overruled by the more recent authorities. In *Williams v. Lamb* (f) it was held that where the husband had mortgaged in fee before the marriage, the wife was not entitled to dower; and the same principle applies to a mortgage after marriage, in which the wife joins for the purpose of barring her dower. *Fisher on Mortgages*, 2nd ed., p. 307, citing *Powell on Mortgages*, p. 286, n. s., *D'Arcy v. Blake* (g). Even if the Court should be of opinion that Mrs. Brown is entitled to dower, the Plaintiff is entitled to a reasonable time to get in her dower, *Coffin v. Cooper* (h); and if a reference is made as to title, it will be sufficient if he can shew a complete title in the Master's office, *Langford*

Argument.
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(e) 2 P. Wms., 714.
(f) 3 Bro., C. C., 264.

(g) 2 Sch. & Lef., 386.
(h) 14 Ves., 205.

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v. Pitt (j); and even after report, the Court will give time to remove objections, *Portman v. Mill (k)*, *Edwards v. Wickwar (l)*. We, however, submit that the Defendant has accepted the title, and ask a declaration to that effect, and an immediate Decree to complete the purchase.

Mr. J. W. Stephen and Mr. Webb for the Defendant.—The only question to be determined is as to Mrs. Brown's right to dower. A married woman joining in a mortgage of her husband's real estate, for the purpose of barring her dower, only bars it *pro tanto*, and she still remains entitled to her dower, subject to the mortgage. *Dolin v. Coltman (m)*, *Innes v. Jackson (n)*. Where upon a mortgage the equity of redemption is reserved so as not to follow in terms the state of the title before the mortgage, the title to the equity of redemption will not thereby be altered, unless there is a strong indication of intention to alter the beneficial ownership of the equity of redemption, *Clarke v. Burgh (o)*, *Whitbread v. Smith (p)*, *Pigott v. Pigott (q)*; and this principle has been held to apply to the case of a wife concurring in a mortgage of lands in which she has a right to dower. *Coots on Mortgages*, 524, *Jackson v. Parker (r)*. No doubt the opinions of eminent conveyancers upon the point under discussion have been divided, and several opinions on either side will be found collected in 4 *Jarm. Byth*, 1st ed., 178 *et seq.* *Dolin v. Coltman* and *Jackson v. Parker* are, however, distinct authorities in favour of the wife's right to dower, and the latter is cited and approved of in *Jackson v. Innes (s)*, and the same view is adopted by Mr. Jacob (*t*). The Plaintiff is not now entitled to time to get in the dower; for he does not by his

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| (j) 2 P. Wms., 630. | (p) 3 DeG. M. & G., 727. |
| (k) 1 R. & M., 696. | (q) L. R., 4 Eq., 549. |
| (l) L. R., 1 Eq., 403. | (r) Amb., 687. |
| (m) 1 Vern., 294. | (s) 1 Bligh., 123. |
| (n) 16 Ves., 167, 370; S. C., 1 Bligh, 104. | (t) 1 Rep., H. & W., 537, cited in 1 Bright, H. & W., 525. |
| (o) 2 Coll., 227. | |

Bill make a case of a defect in title which can be removed, but seeks to force the title as it is on the purchaser, treating the objection as altogether unfounded. Even if Mrs. *Brown* were now willing to concur in the sale, the Plaintiff cannot compel the Defendant to complete his purchase under the original contract, which was with the Plaintiff only, and not with Mrs. *Brown*, for there is no mutuality. *Sugd. V. & P.*, 14 ed., 217, citing *Noel v. Hoy* (v).

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Mr. *Forster*, in reply, cited *Heather v. O'Neil* (w) and *Atkinson v. Smith* (x).

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

This case involves a question of title to certain premises in William street, Melbourne. Mr. *Brown* was seised of them, being a man married before 1st January, 1837, so that his wife's dower attached. On the 22nd September, 1842, he mortgaged them and other property, his wife legally joining in the conveyance, to secure £1,300 to Mr. *Pohle*; the clause of redemption being that, upon payment by *Brown*, his heirs, executors, administrators, or assigns, *Pohle* should convey according to the direction of *Brown* his heirs, executors, administrators, or assigns. There being a large arrear of interest due upon this mortgage, *Brown* agreed to release the equity of redemption to *Pohle* in consideration of the principal and interest due, and this agreement was carried out by indenture, 18th June, 1844. By mesne assignments *Pohle's* estate in the premises became vested in Mr. *White*, who, 11th September, 1855, mortgaged to the Plaintiff, Mr. *Hoyle*, with power of sale. This mortgage money being unpaid, Plaintiff caused the premises to be sold by auction, and the Defendant, Mr. *Edwards*, purchased for £600.

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(v) V. C., 23 Feb., 1820, M.S. (w) 2 DeG. & J., 399.
(x) 3 DeG. & J., 186.

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A contract in writing was executed by the auctioneer, as agent of the Plaintiff and the Defendant, on the 3rd September, 1868, with the following conditions:—That the Defendant should pay half cash, half bill at six months' with interest at eight per cent., and complete his purchase on the bill becoming due, but should be entitled to possession on accepting title; and if from any cause whatsoever his purchase should not be completed at the time specified, he should pay interest on unpaid purchase money at ten per cent., without prejudice to the Plaintiff's right to make void the sale, resell the property, or claim a forfeiture of the deposit money, if he should think fit. That all deeds in possession of Plaintiff should be produced to the Defendant on application within ten days, and the Defendant should within twenty-one days deliver to the Plaintiff's solicitor a statement in writing of all objections and requisitions to or on the title—all objections and requisitions not so delivered to be considered as absolutely waived. That if the Defendant should make an objection or requisition which the Plaintiff should be unable or unwilling to remove (which right of election the Plaintiff absolutely reserved to himself), the Plaintiff might (whether he should have attempted to remove such objection, or to comply with such requisition, or not) at any time annul the sale, and repay the Defendant the amount of his purchase-money in full satisfaction of all claims and demands whatsoever of the Defendant, without interest, costs or damages of any description. That all copies of deeds or documents, whether in the Plaintiff's possession or not, which might be required for verifying the abstract, and the production of documents not in the Plaintiff's possession, should be procured at the Defendant's expense. That time should be considered the essence of the contract. That the tenant should have six weeks allowed to remove. That the Defendant should be entitled to have a conveyance executed to him in escrow on his accepting title. Nothing but experience has led

me to suppose that purchasers of ordinary intelligence could be found to enter into such bargains. The seller generally knows something of his title, the purchaser nothing. If the purchaser finds the title bad after delay, he has to pay all the costs of investigation, which are all thrown on him. He is left to bear the loss of his costs and interest. If the title is bad, but curable, the seller may consider whether it is more for his interest to cure it, and hold the purchaser to his bargain, or to rescind. Everything the purchaser has to do as to title, objecting, &c., is to be done in narrow prescribed time (time, the essence of the contract), or objections waived. For everything the seller has to do, satisfying objections, &c., no time is fixed, so it is left to the vagueness of a reasonable time.

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The Defendant's solicitor on the 11th September, 1868, made, among other requisitions of title now immaterial to consider, one "We require the right of dower of the wife of the Crown grantee, *S. G. Brown*, to be properly released." A correspondence ensued between the solicitors upon this. The Plaintiff's solicitors at first answered that the dower was released by the mortgage to *Pohle*; then that they feared they could not comply with the requisition, and the contingent right to dower must be small, and leaving it to Defendant's solicitors to consider whether the requisition was worth insisting on. The Defendant then, 23rd September, declined to take the title, and the Plaintiff's solicitors at same time stated they would comply with the requisition, but the Defendant's solicitors persisted in declining the title. The solicitors then got into a correspondence as to the execution of a conveyance in escrow, and difficulties about it, but, 25th September, the Defendant's solicitors treated the contract as pending if the requisition was complied with. On the 26th, Plaintiff's solicitors replied that the objection would be removed in a reasonable time. On 28th September,

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the Defendant refused to be delayed, and rescinded. The objection was of title, not conveyance, but related to a matter of small comparative value, and the Plaintiff should have a reasonable time to remove it; so that at this stage of the proceedings, the Defendant was, I think, all wrong. But the correspondence between the solicitors continued. On the 1st October, 1868, the Plaintiff's solicitors wrote that in the previous correspondence it was assumed that Mrs. Brown was entitled to dower, and on that assumption they undertook to have the dower released; on further consideration they were satisfied no such right existed. On 2nd October, the Defendant's solicitors required the return of deposit; but by another letter of the same date, invited discussion as to the law about dower. The correspondence went on as to other objections, but the defendant had demanded the deposit and bill from the auctioneer, and had commenced an action against him. There were some proposals afterwards for adjustment from the Defendant's to the Plaintiff's solicitors which make me think that the Defendant was not then an unwilling purchaser, if he got a good title. But this bill was served 23rd October. It insists that, under the conditions, Defendant could make no new objection or requisition; it states that the Plaintiff's solicitors obtained the opinion of counsel that Mrs. Brown was not entitled to dower, and that on the 3rd and 5th of October the Defendant's solicitor concurred in that view (of which latter no evidence has been given). The bill prays a declaration that the Defendant has accepted the title, and should be ordered specifically to perform the agreement, and be restrained by injunction from prosecuting the action against the auctioneer—costs and general relief.

As to Mrs. Brown's right to dower, it is a point highly controverted among conveyancers, whether if a wife joins her husband in a mortgage to bar dower by a deed not

clearly indicating her total renouncement of it in his favor, she is entitled to redeem the mortgage. The opinions of text writers on conveyances are divided. One decision, *Dolin v. Collman* (y), appears with the wife; so a dictum of Lord Redesdale in *Jackson v. Innes* (z), embracing several matters; referred to with approbation, not distinguishing this matter by *V. C. Knight Bruce*, in *Clark v. Burgh* (a). I have not been referred to any decision or judicial dictum the other way. I cannot certainly say, in this state of authority, that her power of redemption, she surviving her husband, is no defect of title. Even the House of Lords, in *Blosse v. Clanmorris* (b), has decided that a doubt upon title makes it bad; and would not solve the doubt in a suit between seller and purchaser, in which the person having the doubtful claim was unrepresented. The mortgagee, *Pohle*, might have satisfied his demand in other ways—foreclosure or sale—so as to get rid of Mrs. Brown's claim to dower; but he took the course of purchasing the equity of redemption from her husband, and can stand in no better position than he would. The claim to dower, if established, would be of very trivial value, but a trivial debateable right of the kind is a blot upon title; and if the Defendant submitted to take the title with that blot he would be subjected to litigation: and if he wanted to resell, he would be obliged to submit to the inconvenience either of buying Mrs. Brown's claim, or selling with a condition that the purchaser should take the title subject to that objection.

This bill is filed insisting that the title is good, the only objection urged in time being bad; it seeks no alternative. I hold the title bad, and should at all events make the plaintiff pay the costs of suit. His counsel at the hearing seeks a reference as to title. There is nothing to refer. I agree with the bill so far. I have merely to

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(y) 1 Vern., 294.

(z) 1 Bli., 126.

(a) 2 Col., 227.

(b) 3 Bli., 62.

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decide upon one point. I have hesitated whether I should say that if the release of Mrs. *Brown* were procured within a limited time by the Plaintiff, the sale should be completed. I am influenced against this by the form of the contract, unequally stringent and unfair on matters of which the bill seeks the benefit. The Plaintiff was entitled to a reasonable time to remove the objection, from 1st October to the filing of the bill. In the frame of his bill he insisted only that the objection was invalid. The reasonable time for removing the objection had passed, 22nd March, when I heard the cause. Even then the Plaintiff did not offer to undertake to remove the objection within a limited time; he wanted to carry on—he loose, the Defendant fast—so that he might consider whether it would be more for his interest to pay for a release to Mrs. *Brown*, and force a completion of the purchase, or allow it to be rescinded. Partly, perhaps, from the frame of the suit, without an alternative, I am not furnished by the Defendant with materials for dealing equitably between the parties, compensation for delay, costs occasioned by the defect of the title, and adjustment of intermediate profits, against interest. I have, on the whole, concluded to dismiss the bill with costs.

Bill dismissed with costs.

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March 15, 18.

April 16.

SUIT to administer the real and personal estate of *J. D. Stodart*, deceased. The deceased, by his will, after giving his furniture to his wife, gave, devised and bequeathed all his real and residuary personal estate to his wife and brother (who were also appointed executrix and executor), upon trust to pay the income to his wife during widowhood, and after her decease or marriage, in trust for his children equally as tenants in common, whom failing upon trust to sell and convert and stand possessed of the proceeds in trust for his next of kin. The will contained a provision that if the income of the testator's real and residuary personal estate should be inadequate for the proper maintenance and support of his wife and children during their minority, the trustees might in their discretion apply the whole or any part of the *corpus* of the residuary personal estate for such purpose. The testator died on 12th June, 1867, leaving a widow and several infant children. The personal property was insufficient for payment of the testator's debts, but there was considerable real estate. The present bill was filed by the infant children against the executrix and executor, and prayed that if necessary a competent part of the real estate might be sold or mortgaged for payment of the testator's debts.

S. died leaving real and personal estate which he devised and bequeathed to trustees for the benefit of his wife and children. The personal estate was insufficient for payment of debts. Decree made in a friendly administration suit, authorising money for the payment of debts, to be raised by mortgage of the real estate, with or without power of sale, at the discretion of the Master.

Mr. *Webb* for the Plaintiffs. It is desired that, instead of the real estate being sold, a mortgage of it should be authorised, as being most beneficial to those entitled under the will. In *Walker v. Hogan* (c) it was held that this Court did not possess the power of authorising mortgages of infants' estates for payment of debts; but since that case was decided the "*Real Property Act*," No. 213, sec. 147, has been passed, which appears to recognise such a power in the Court, although it does not expressly confer it.

(c) *Ante*, Vol. I., Eq., 88.

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 —
Judgment.

Mr. *Molesworth*, for the Defendants, concurred in the advisability of the money being raised by mortgage.

MR. JUSTICE MOLESWORTH.—I will direct the money to be raised by mortgage; but I am not disposed, unless authorities can be produced upon the point, to authorise the insertion of a power of sale in the mortgage, without the express authority of the Legislature. Mortgages are now prepared in a way that I think unreasonable; the provision as to sale, giving mortgagees offensive and dictatorial powers.

March 18.
 —
Argument.

Mr. *Webb* now cited, in support of the insertion of a power of sale in the mortgage, *Russell v. Plaice* (d), *Selby v. Cowling* (e), and *Bridges v. Longman* (f).

Cur. adv. vult.

April 16.
 —
Judgment.

MR. JUSTICE MOLESWORTH.—In this case I will make the decree authorising the money to be raised by mortgage, with or without power of sale, at the discretion of the master. The master must make the best bargain he can for the parties.

(d) 18 Beav., 21.

(e) 23 Beav., 418.

(f) 24 *Ib.*, 29.

SAWYERS v. KYTE.

1869.

April 13, 14,
29.

BY indenture of settlement of the 5th May, 1856, executed in contemplation of the marriage of Mrs. *Rachel Sawyers*, a widow, with Mr. *John Watson*, Mrs. *Sawyers* conveyed certain real and personal estate to Messrs. *W. M. Turnbull* and *Ambrose Kyte*, upon trust for her separate use for life, with remainder as she should by deed or will appoint. On 6th May, 1856, the marriage was solemnised. Subsequently *Turnbull* resigned his trusteeship, and Mr. *Robert Dunn* was duly appointed a new trustee in his stead. On 26th May, 1858, Mrs. *Watson* made her will, whereby, after reciting the settlement and that certain lands other than those comprised in the settlement stood limited to such uses as she should notwithstanding coverture by deed or will appoint, and also that 125 shares in the Bank of Victoria were then standing in the names of *Kyte* and *Dunn*, and were held by them in trust for such person or persons as she should notwithstanding coverture by deed or will appoint, she appointed and also gave, devised, and bequeathed to *Ambrose Kyte*, *William Gilmore*, and *George Henry Williams* all her real and personal estate and the said lands and shares upon trust for sale and conversion, and after payment thereof of her funeral and testamentary expenses, and the debts owing from her or her separate estate, and certain legacies and annuities, to invest the proceeds "in the name or names of them the said *Ambrose Kyte*, *William Gilmore* and *George Henry Williams* or the survivors or survivor of them or the executors or administrators of such survivor in or upon wilful default against the trustees.

W., by her will, gave all her real and personal estate to trustees for sale and conversion, and investment "upon Government or real security or in or upon the shares stocks or securities of any incorporated company paying a dividend." The trustees advanced £1,100 of the assets to *B.* on his promissory note only, and alleged that they did so in consequence of a previous promise by the testatrix to *B.* to do so.

Held, that this was a misinvestment for which the trustees were liable.

A misapplication of trust funds does not warrant an account with

Persons dealing with executors who are also trustees, are not bound to inquire whether the executorship has, or should have been, turned into a trusteeship; and are therefore not liable for parting with the assets to one only of three executors and trustees, by whom they are afterwards misapplied, without the knowledge of his co-executors and trustees.

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Government or real securities in the colony of Victoria or in or upon the shares stocks or securities of any company incorporated by Royal Charter or Act of Parliament or of the Colonial Legislature and paying a dividend with power to vary or transpose such securities respectively into or for others of the same or a like nature," and to hold the trust moneys, securities, and premises in trust for all her children in equal shares, and as to the shares of daughters for their sole and separate use for life, with remainder to their children; and she appointed *Kyte, Gilmore, and Williams* executors. By a codicil dated the 28th May, 1858, the testatrix declared that the aforesaid trust by her will created for her children, should extend to any child or children she might have by her then husband *Watson* equally with her children by her late husband.

The testatrix died on the 28th April, 1859, leaving three children by her former husband (*Martha, Mary, and John*), and one child by her then present husband (*Rachel*), and her husband, surviving her. The executors all proved the will, and entered into possession of the real and personal estate, and made payments to those beneficially interested under the will of portions of the income of their shares, *Kyte* taking the principal management as acting executor. He from time to time furnished accounts to the *cestuis que trustent*, purporting to shew his dealings with the trust property, but these being in themselves contradictory and unsatisfactory, the present suit was instituted on behalf of *John Sawyers*, the infant son of the testatrix, against *Kyte* and *Dunn*, as trustees of the settlement, *Kyte, Gilmore, and Williams*, as executors and trustees of the will, *Martha Smith* (formerly *Martha Sawyers*), *Mary Smith* (formerly *Mary Sawyers*), and their respective husbands, and *Rachel Watson*, for an administration of the estate of the testatrix, and for accounts both under the settlement and the will.

The Bill charged that *Kyte*, as the principal acting executor, had received assets to a very considerable amount, and that, after payment of all funeral and testamentary expenses and debts, a balance of £15,000 and upwards remained in his hands, and had been by him employed in his own affairs and business, or converted to his own use, and upon which he ought to be charged with interest, but that nevertheless in the accounts furnished by *Kyte* it was represented that the banking account of the executors was overdrawn, and the estate was charged with interest upon such overdraft, and that *Kyte* also charged the estate with interest upon alleged advances by him to the estate. The Bill also made a charge of wilful default or neglect against *Kyte*, *Gilmore*, and *Williams*, and specified the following as particular instances:—That a mortgage debt of £2,500 due by the Defendant *Williams* to the testatrix at her death had been allowed to remain outstanding long after it became due; that a large arrear of interest upon it had accrued; that the property mortgaged was an insufficient security, and that no steps had been taken to enforce payment by *Williams*. That a sum of £1,100 stated in the balance sheet furnished by the Defendant *Kyte* as a loan upon mortgage to *Charles Bradshaw* in 1860, with a very considerable arrear of interest, still remained outstanding; that £55 only appeared to have been ever received for interest; that the security (if any) upon which the money was lent (as to which discovery was sought) was insufficient; that no steps whatever had been taken for the recovery of the amount due, and that it had been wholly lost to the estate. The Bill also charged that 541 shares in the Collingwood Gas Company, had been purchased upon credit by *Kyte* as an investment, when he had more than sufficient funds in hand to pay for them, and sought to charge him with any loss caused by the enhanced price paid by reason of the credit. Also, that *Kyte* alleged by his accounts that he had invested £263 13s. 6d. of the trust funds in the purchase of twenty-

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five shares in the Warrenheip Distillery Company, which was not an investment warranted by the trusts of the will, and which shares were subsequently forfeited and became valueless. Also, that the 125 shares in the Bank of Victoria, which were held by the trustees of the settlement at the time of the death of the testatrix, and which were an investment warranted by the will, or the greater part of them, had been sold by the executors for £5,000 or upwards, and the money misappropriated; and that such shares were entered as an asset of the estate in the last balance-sheet furnished by the Defendant *Kyte*, although they had been sold long previously. The Bill alleged that application had been made to *Kyte* for further accounts, which were refused, and sought discovery from the executors of their receipts and disbursement, and particulars of all investments of the trust moneys, alleged by them to have been made, and of the securities therefor. The Bill prayed for the administration of the estate by the Court, for accounts with wilful default as against *Kyte* and *Dunn* as trustees of the settlement; and *Kyte*, *Gilmore*, and *Williams* as executors and trustees of the will, and for the appointment of a receiver.

The Defendant *Kyte*, by his answer, stated that the £1,100 was lent to *Bradshaw* in May, 1859, upon his acceptance only, without any other security, in consequence of an alleged agreement by the testatrix shortly before her death to lend him that sum upon his personal security; that *Bradshaw* executed an assignment for the benefit of his creditors in July, 1860; that his estate paid a dividend of 1½*d.* in the pound only, and that the executors did not prove as creditors on the estate; that as to the Warrenheip Company's shares, although it appeared in the accounts furnished by him that they had been paid for out of the estate, they were in fact paid for by *Kyte* out of his own money, and that no loss had resulted to the estate from them; that as to the Bank of Victoria shares, 55 were sold

in June, 1865, 31 in September, 1865, and 31 in October, 1865, realising in the aggregate £4,948 11s., which was received by *Kyte*, but that by an error of his accountant these shares were entered as an asset of the estate in the balance-sheets subsequently furnished by *Kyte*. In setting forth the investments by him this Defendant, in his answer, took credit for *inter alia* £2,250 alleged by him to have been invested in the purchase of 2,000 shares in the Pioneer Silver Mines Company. Upon the coming in of the Defendant *Kyte's* answer, the Plaintiff moved for an order for payment into Court by *Kyte* of the sum received by him for the sale of the Bank of Victoria shares, and interest thereon; and upon the 4th November, 1868, an order was made for payment of £5,000 into Court by the Defendant *Kyte*, within a fortnight. On the 16th November *Kyte* died intestate, and without having complied with this order. Letters of administration to his estate were taken out by *Sarah Anne Kyte*, his widow, and the Bill in this suit was subsequently amended by stating these facts, adding Mrs. *Kyte* as a party, and a prayer that, unless she admitted assets for the purposes of this suit, an account might be taken of his personal estate, debts, funeral, and testamentary expenses, and that his estate might be applied in a due course of administration.

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The Defendant *Dunn*, by his answer, admitted having joined with *Kyte*, as trustees of the settlement, in purchasing the 125 shares in the Bank of Victoria, alleged that the scrip for these shares was retained by *Kyte*, and admitted that the shares were sold by *Kyte*; and that he (*Dunn*), at the request of the Defendant *Kyte*, in June, September, and October, 1865, executed transfers of the shares so sold.

The Defendant *Gilmore's* answer was substantially the same as *Kyte's* as to *Williams's* mortgage and the loan to *Bradshaw*, in which he admitted he concurred. As to the Bank of Victoria shares, he stated that they had been sold

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by *Kyte* without his knowledge, and that he had first learnt of the sale after the institution of this suit.

Mrs. *Kyte*, by her answer did not admit assets, but alleged that she had instituted a suit of *Kyte v. Kyte* for the administration of the real and personal estate of *Ambrose Kyte*; and that the usual decree in such cases for such purpose was made on the 2nd February, 1869, and was being prosecuted.

The Defendants *G. H. Williams*, and *Mary Smith* and her husband were out of the jurisdiction, and were not served with the bill. The Defendant *P. H. Smith*, husband of *Martha Smith*, died before answer, and his widow answered alone. The Defendant *Rachel Watson*, an infant, put in, by her guardian, the usual infant's answer. The suit now came on for hearing.

Argument.
 —

Mr. *J. W. Stephen* and Mr. *Webb*, for the Plaintiff, asked for the usual administration decree with an account with wilful default against *Kyte*, *Dunn*, and *Gilmore*; a declaration that the investments or loan to *Bradshaw*, and in the Pioneer Company's shares, and Warrenheip Company's shares were improper, and ought to be disallowed; a declaration that *Dunn*, *Gilmore*, and *Kyte's* estate, were liable to replace the Bank of Victoria shares sold, and pay the amount of dividends accrued since the sale; an inquiry whether the executors might have got in *Williams's* mortgage money; an inquiry whether any and what loss was sustained by the purchase of the Collingwood Gas shares on credit; an inquiry as to the balances from time to time in the hands of the executors, and that they might be charged with interest on such balances.

Mr. *Miller* for the Defendant *Martha Smith*; and Mr. *Atkins* for the Defendant *Rachel Watson*, in the same interest as the Plaintiff.

Mr. *Holroyd* for the Defendant *Dunn*.—During Mrs. *Watson's* lifetime *Dunn* did not interfere with the management of the trust property, at her request, as she looked after it herself, and on her death the estate went to the executors. *Dunn* was guilty of no breach of trust during her lifetime, and after her death he could not prevent any one of the executors selling the bank shares.

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Mr. *Lawes*, for the Defendant *Gilmore*.—This Defendant is not liable to account with wilful default; but he is willing to have the ordinary accounts taken. He is not liable for the loss (if any) by *Williams*, for it is not shewn that the money could have been recovered if the executors had taken any steps; nor is it shewn that there will be any loss in fact. Nor is he liable for the loan to *Bradshaw*, for in making that loan he was only carrying out an arrangement made by the testatrix prior to her death. As to the Bank of Victoria shares, he knew nothing of their sale, until after the institution of this suit.

Mr. *Forster*, for Mrs. *Kyte*, submitted that as the accounts of *Kyte's* estate were being taken in the suit of *Kyte v. Kyte* it was unnecessary that they should be taken again in this suit.

Mr. *J. W. Stephen*, in reply, declined to consent to the accounts as taken in that suit, which was a friendly suit between the family of the late Mr. *Kyte*.

The authorities referred to were—*Hanbury v. Kirkland* (g), *Brics v. Stokes* (h), *Coope v. Carter* (j), *Pocock v. Reddington* (k), *Shepherd v. Towgood* (l), *Elliott v. Turner* (m), *Lewin on Trusts*, 353 and 359, *Sleight v. Lawson* (n), *Langford v. Gascoigne* (o),

(g) 3 Sim., 265.

(h) 11 Ves., 319.

(j) 2 De G. M. & G., 292.

(k) 5 Ves., 794.

(l) T. & R., 379, 388.

(m) 13 Sim., 485.

(n) 3 K. & J., 392.

(o) 11 Ves., 333.

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Stiles v. Guy (p), *Williams v. Nixon* (q), *Court v. Jeffrey* (r),
 and *Brenchley v. Lynn* (s).

Our. adv. vult.

April 29.

MR. JUSTICE MOLESWORTH.—

Judgment.

This suit is between the members of the family, and trustees, of Mrs. *Rachel Sawyers*, who in the year 1856 married Mr. *Watson*. She was possessed of large property, freehold, leasehold, mortgages, debts by simple contract, &c., and by settlement upon her marriage conveyed it to Mr. *Kyte* and another, as trustees, to hold as for her separate use, and to be disposed of by her deed or will as if sole. This settlement contained the usual indemnity clauses to trustees. It was afterwards rectified by a decree in this Court, in a matter unimportant in this suit, and Mr. *Dunn* was appointed co-trustee with *Kyte*. Mrs. *Watson* afterwards purchased more freehold property, and 125 shares in the Bank of Victoria (each paid up £25), which were conveyed to or vested in *Kyte* and *Dunn* as trustees upon, I should infer, similar trusts, but by deeds not proved. She made a will leaving all her property to the same *Kyte* and Messrs. *Williams* and *Gilmore* (whom she named executors), as trustees, leaving legacies and annuities to a large amount, directing investment in the names of her trustees in Government or real securities, or the shares, stocks, or securities of any company incorporated by Royal Charter or Act of Parliament, and paying a dividend, upon certain trusts for her children by Mr. *Sawyers*, her first husband, then, and at the commencement of this suit, infants. This will also contains usual clauses of indemnity to trustees. By a codicil she made her child by *Watson* to share with the *Sawyers*. She died April, 1859; all executors took probate.

(p) 16 Sim., 230.
 (q) 2 Beav., 472.

(r) 1 S. & S., 105.
 (s) 2 Rob., Ecc., 441.

Kyte and *Dunn*, as trustees of the settlement, appear never to have accounted to the executors and trustees of the will. The other executors received some of the assets conjointly with *Kyte*, and paid them in bank to their credit, but *Kyte* was mainly the acting executor and trustee. He furnished balance-sheets of the assets to his co-executors and the guardians of the infant children. One of the debtors to Mr. *Watson's* estate by mortgage for £2,500, was *Williams*, the executor, who went afterwards to, and is now in England. *Kyte* and *Gilmore* advanced £1,100 of the assets to Mr. *Bradshaw* on promissory note, *Kyte* representing to *Gilmore* that the testatrix had promised to do so. A half-year's interest was paid on this, and *Bradshaw* became insolvent, his property yielding a nominal dividend. This was clearly a misinvestment, for which I shall hold both liable. *Kyte* purchased also some Collingwood Gas shares as executor, which I shall declare a good investment. He purchased shares in the Warrenheip Distillery, and the Pioneer Silver Mining Company, which he sought to attribute to the trust estate, which I shall declare to be investments not warranted. Between June 20 and October 6, 1865, he sold out 117 of the Victoria Bank shares, and applied the proceeds, nearly £5,000, to his own use. He induced *Dunn* to join him in assigning these shares, but continued in the balance-sheets furnished to his co-executor, &c., to represent them as part of the outstanding trust estate.

Kyte died in November last, after he had answered in this suit, and a receiver had been appointed in it; and his widow, Mrs. *Sarah Ann Kyte*, took administration to him. It appears to be now apprehended that his assets will not meet his liabilities. There is no doubt as to *Kyte's* liability for his actual receipts, and that some of his investments were not warranted, so that he should not have credit for them. He appears also to have had large balances in his hands, which he was using for his own

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purposes—although in his accounts he was seeking to charge interest as for advances by him—on which he should be made to give interest. As Mrs. *Kyte* does not admit assets, it will be necessary to direct accounts of his estate, so as to ascertain what is applicable to the claims against him as executor of Mrs. *Watson*.

The Bill prays accounts against *Kyte* and *Dunn* of what they received, or, without wilful default, might have received; but there is no evidence of any instance of wilful default to warrant the latter inquiry. The Plaintiff's counsel have sought, as against *Kyte* and *Gilmore*, accounts of what they, without wilful default, might have received; but as to them, too, I find no instance established to warrant it—a misapplication of funds received does not warrant such account. There is much inaction as to *Williams's* mortgage, for which the fact of his being a co-executor and co-trustee affords some excuse, but I have been referred to no case shewing that inaction is a ground even for preliminary inquiry in the office. The Plaintiffs should have proved a loss by inaction; that *Williams's* debt might at one time have been recovered, and cannot now. As to *Bradshaw's* debt, it seems to have been hopeless when it fell due, and to afford no evidence of remissness in enforcing.

It has been sought to make *Dunn* responsible for the loss of the Victoria Bank shares which he enabled *Kyte* to appropriate. As executors of Mrs. *Watson*, each was entitled to receive her assets, and I do not think persons dealing with executors, also trustees, are responsible for inquiring if the executorship has, or should have been, turned into a trusteeship. If married women by settlement are authorised to make wills appointing executors and trustees, their debtors, or persons holding their property, may, I think, regard their representatives as if they were sole. The judgment in *Brenchley v. Lynn* regards the

relations of Courts of Equity and Probate Courts as to such cases. *Court v. Jeffrey* is a mere case of parties in equity. In it the Judges held that an administrator, with the will annexed, of a *feme covert* must make her appointees parties, the case being distinguished from that of an ordinary personal representative by there being no debts. Here the Bill recognised and provided for debts, and I have in evidence the decree in *Watson v. Kyte*, pronounced after these transfers, establishing a large debt. The Bill does not at all present this case against *Dunn*, and to establish it I should have some evidence of the deed declaring trusts of these shares, and as to the manner by which such shares are transferable under the partnership articles of the bank.

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It has been sought, also, to make *Gilmore* responsible for the misapplication of these shares. He was ignorant until after this suit of *Kyte* having received the proceeds. It is said *Gilmore* should have required an assignment of them to have been made to the trustees of the will jointly, and thereby prevented the misapplication. Before I dealt with this view also, I should have evidence of the manner of transferring Bank of Victoria shares. If the case were brought to resemble that of a trustee of a mortgagee's will, inducing the person holding the legal estate in the land to enable him to get the money by conveying it, I know of no authority to make a co-trustee liable for not having procured an assignment of the legal estate to the trustees jointly. But the Bill does not make this case, or indicate an intention of charging one trustee of the will for a misappropriation by the other. As to both *Dunn* and *Gilmore*, it would be material for each of them that he should be shewn such intention by the Bill, so that he might make a case of comparative liability against the other; but as to both, I rather think that it occurred to the Plaintiff's counsel at the hearing for the first time to seek to make them responsible in this respect.

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Decree.

I shall not at present deal with costs. I understand the Plaintiff's counsel not at present to seek accounts for the administration of the trust by this suit.

" Declare that the trusts of the settlement on the marriage of Mrs. *Rachel Watson* in bill named as rectified by the decree therein stated, and the trusts of her will and codicil in bill stated, should be carried into execution. Refer it to the Master to take an account of the rents, issues, and profits of the real estate and of the personal estate which came to the hands of *Ambrose Kyte*, deceased, and the Defendant *Robert Dunn*, or either of them, or of any person or persons for their or either of their use respectively as trustees of the said settlement, and of the manner in which the same have been applied and disposed of, and to strike a balance for or against them, and each of them respectively, at the date of the death of the said *Rachel Watson*, making all just allowances; also, to take an account of the rents, issues, and profits of the real estate and of the personal estate which came to the hands of the said *Ambrose Kyte* and the Defendant *William Gilmore* or either of them (whether or not conjointly with *G. H. Williams* in bill named), or of any person or persons for their or either of their use respectively, as executors or trustees of the will of the said *Rachel Watson*, and the manner in which the same have been applied and disposed of, making all just allowances. Declare that the investment of the assets of the said *Rachel Sawyer* in Collingwood Gasworks shares should be treated as one warranted by the said will, and allowed; and the investments thereof in a loan to *Charles Bradshaw* in bill named, and in the purchase of Warrenheip Distillery shares, and of Pioneer Silver Mines shares, should be treated as not warranted by the said will, and disallowed. Declare that the said *Ambrose Kyte* was liable for the said three investments, the Defendant, *William Gilmore*, for the first of them only. Declare that the sale of the 117 shares of the Bank of Victoria, made by the said *Ambrose Kyte*, in bill mentioned, was a breach of trust for which his assets are liable. Refer it to the Master to report the sums which he received for the same, and the dividends payable on the same since the sale thereof, without prejudice to the question of the manner of fixing the said liability. Refer it to the Master to inquire and report the balances from time to time for or against the said *Ambrose Kyte* and *William Gilmore*, or either of them respectively, as to the assets of the said *Rachel Sawyers* actually in their hands, making annual rests, the first rest a year after her death, having regard to the above directions as to the allowance or disallowance of investments, and as to the said *Ambrose Kyte* having regard to the state of his account as trustee of the settlement at the death of the said *Rachel Watson*. Let the Master be at liberty to report special circumstances for or against the propriety of charging interest on the said balances. Let the Master strike a balance down to the date of his report for or against the said *William Gilmore* and

"*Ambrose Kyte*, and each of them respectively, not regarding liability "for interest on the said balances, or the said 117 Bank of Victoria "shares. Refer it to the Master to take an account of the personal "estate and effects of the said *Ambrose Kyte*, deceased, which have "come to the hands of the Defendant, *Sarah Ann Kyte*, or of any "person or persons for her use, and how the same have been applied "and disposed of, and also an account of his outstanding personal "estate and effects, and of what the same consists; also an account of "his funeral and administration expenses, and of his debts, distinguish- "ing the priority thereof and those paid and remaining unpaid down "to the date of the report. Order that the receiver appointed by "order made in the cause *Sawyers against Ambrose Kyte and others*, "dated August 19, 1868, be continued and extended to the rents and "profits of the property of the said *Rachel Watson* excepted thereout, "and left then in the hands of the said *Ambrose Kyte*, namely, the "several properties mortgaged by *Mathew Hervey*, *Henry Beeston* and "*Benjamin Kemp*, such receiver first giving additional security, to be "approved by the said Master. Order that such receiver be at liberty, "until further order, from time to time to make the payments directed "by the order made in this cause on the 4th day of February, 1869. "Reserve further directions and costs. Liberty to apply."

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Decree.

TIERNAN v. NOLAN.

MOTION by Defendant to set aside a writ of *fieri facias*, issued on the decree made in the cause on the 29th of April, 1865.

Mr. *Lawes*, for the Plaintiffs, took a preliminary objection, that the solicitor who had served the notice of motion was not the solicitor on the record; and that there had been no order for change of solicitor.

Mr. *F. L. Smyth* for the motion. The solicitor on the record, was solicitor for both the original Defendants, one of whom has died since the decree. By the decree it is stated that the Defendant now moving did not appear at the hearing. It would seem, therefore, that the Defendant *Nolan* has, as yet, had no solicitor, and that he has not

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Where a notice of motion was served as for a Defendant by a solicitor not his solicitor on the record, upon this objection being taken the motion was dismissed with costs.

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Judgment.

separately appeared; and therefore no order to change solicitors was necessary.

MR. JUSTICE MOLESWORTH.—I think the general rule applies in this case, that each party has a right to know who represents his opponent. It applies perhaps with greater force, where the Defendant has been merely passive.

Motion dismissed with costs.

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May 7.

LEARMONTH v. MORRIS.

To a suit by the purchasers, for specific performance of a contract for the sale of a mine, the defence was that the vendors had been induced to enter into the contract by the misrepresentations of B., the Plaintiffs' agent, who negotiated the purchase.

SUIT by the purchasers for specific performance of a contract for sale of a mining claim. The Plaintiffs (*Thomas Learmonth* and others) were mining in partnership under the style of the "Egerton Gold Mining Company," on land at Mount Egerton, near Ballarat, held under a mining lease from the Crown. The Defendants (*Morris* and seven others) were the owners of an adjoining

Held, per Molesworth, J., that although B. had untruly disparaged the mine, misstated his own opinion of its auriferous nature, used some artifice to mislead the Defendants on the subject, and misstated his authority from his principals, yet this did not disentitle the Plaintiffs to specific performance; and there being no evidence that the Defendants relied on B.'s statements, specific performance decreed, but without costs. On appeal,

Held, by the full Court, that the Plaintiffs were responsible for B.'s representations, but that there was no proof that the Defendants were in any way misled by them: that conceding that misrepresentations were made, they were not made for the purpose of inducing the vendors to enter into the contract, nor was it obtained in consequence of any such misrepresentations: that B.'s acts had not been of such a character as to disentitle the Plaintiffs to relief in Equity: and appeal dismissed, but without costs.

As between vendor and purchaser of a mining claim, it is not necessary that the purchaser should be the holder of a miner's right to enable him to sue in Equity for specific performance, it being sufficient if the vendor have one; and in the absence of evidence either way, the Court will not presume that the vendor had not a miner's right.

Per *Molesworth, J.*—Where a Defendant's defence is that he was deceived, he should be asked as a witness for himself, if he was so.

claim, and worked by them in partnership under the style of the "Mount Egerton Steam Puddling Company." Two Defendants, *Tanner* and *Chapman*, were former shareholders in the claim, who, as the Bill alleged, had parted with their interest therein to the Defendants *Russell* and *Morris* respectively, but still continued as two of the registered owners. On 20th September, 1867, the Defendant *Morris* wrote to the Plaintiffs as follows:—"I am deputed by the eight shareholders of the Mount Egerton Steam Puddling Company, situate in All Nations Gully, Mount Egerton, to offer the claim, machinery, and water rights as it now stands, including blacksmiths' shop, tools, &c., for the sum of £400. The offer to remain open for one calendar month." Previously to this, communications had gone on between the Plaintiffs' agent (*Bailey*) and the Defendants respecting an alleged encroachment by the Plaintiffs on the Defendants' claim; but no question of sale or purchase, of the Defendants' claim, had been mooted. A considerable bargaining took place between *Bailey* and the Defendants relative to the purchase, and eventually on the 24th September the purchase was concluded at the price of £400, of which £20 was paid by *Bailey*, by *Learmonth's* cheque, as a deposit, and a receipt was signed by all the Defendants, except *Tanner* and *Chapman*, as follows:—"Received from the Egerton Gold Mining Company the sum of £20, being deposit money on part payment for the whole of the claim known as the Egerton Steam Puddling Company, situated in All Nations Gully, Mount Egerton, together with machinery, consisting of one vertical engine, boiler, two puddling machines, trucks, tools, buildings, and everything connected with the said claim as it now stands, the remainder of the purchase money, namely, £380, to be paid on completion of this our agreement, and all our rights, title or interest transferred to the satisfaction of Mr. *Henry Cuthbert*, the solicitor of the Egerton Gold Mining Company, and we further bind ourselves to make this agreement valid in the law. Mount

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Egerton, September 24, 1867." Shortly afterwards the Defendants, having in the meantime obtained a better offer from another intending purchaser, repudiated their agreement with the Plaintiffs, on the ground that they had been deceived by *Bailey* as to the auriferous nature and value of their claim; and on the 1st October the Defendant *Morris* requested *Bailey* to take back the cheque for £20, which he declining to do, *Morris* left the cheque in an envelope on the table, and it was subsequently returned to him by the Plaintiffs' solicitor, accompanied by a letter offering payment of the balance of the purchase money, and insisting on a specific performance of the agreement for sale.

All the Defendants, except *Foreman* who answered separately, by their answer alleged their beneficial interest in the claim at the time of the contract for sale, to be vested in the Defendants other than *Tanner* and *Morris*, admitting the sale by *Tanner* to *Russell* of his shares in the claim, but denying the sale by *Chapman* to *Morris*, and relied upon the fact that *Chapman* had not signed the receipt of the 24th September, and *Morris* disclaimed all interest in the claim. The substantial defence, however, made by the answer was, that the Defendants were induced to sell the claim, and sign the recommendation of the 24th September, by the misrepresentation of *Bailey*, the Plaintiffs' agent. The answer averred that *Bailey* in reply to questions from the Defendants, prior to the 24th September, untruly stated that the Plaintiffs were not working within the Defendants' claim; and also that during the negotiations for the purchase, *Bailey* stated that Defendants' claim was of no use, as there was no quartz in it, and that the Plaintiffs wanted the claim only as an area for machinery, and to throw mullock on, and because the dam might be useful; whereas, the Defendants now believed that the claim was worth more than £30,000, in respect of the auriferous quartz in it, and that *Bailey* at the time of making the aforesaid statement was well aware of its value.

The Defendant *Foreman* answered separately, admitting the allegations of the bill, and offering to perform the agreement on his part.

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The facts, as appearing in evidence, are sufficiently stated in the judgments of the Court.

Mr. *J. W. Stephen* and Mr. *Webb* for the Plaintiffs. The agreement for sale is admitted by the Defendants. The answer only sets up misrepresentation by the Plaintiffs' agent, and the Defendants must be limited to that case, and cannot go into any other question of alleged fraud: *Tuck v. Took* (t). The evidence does not support the alleged misrepresentation. The statements made as to the encroachments were made prior to any negotiation for sale; but any representation to affect the contract, must be made in the course of the dealing, the same principles being applicable as in the case of notice: *Sugd., V. & P.*, 621. The misrepresentation, to avoid the contract, must be material, untrue, and known to be untrue, and must also be the inducement for the contract: *Attwood v. Small* (v). Here the Defendants got all the price they asked in the first instance, so that no representation made after the offer of the 20th September could have had any effect, and any representation made before that offer is immaterial, as up to that time the Plaintiffs were in no way dealing for the purchase. The alleged misrepresentations as to the claim being of no value, were mere matters of bargaining, as to which the maxim *Caveat emptor* applies. Even if the Plaintiffs' agent knew that the claim was valuable, he was not bound to disclose it to the vendors: *Fox v. Mackreth* (w). The representations as to the alleged small value of the claim were so vague, that the vendors, if they regarded them at all, should only have been put by them on further enquiry: *Trower v. Newcome* (x). The

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(t) 9 B. & C., 437.
(v) 6 Cl. & Fin., 232.

(w) 2 Bro., C. C., 420.
(x) 3 Mer., 704.

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alleged misrepresentation, even if made, was not such a misrepresentation as to avoid the contract: *Cook v. Waugh* (y). In *Johnson v. Smart* (z), where a house was described as substantial and convenient, and having five bed rooms, it was held that this was no misdescription, although the house was out of repair, and the wall in some places only half a brick thick, and some of the bed rooms extremely small inner rooms, and without fireplaces. The Plaintiffs are therefore entitled to a decree for specific performance: *Lord Brooke v. Rounthwaite* (a).

Mr. T. A'Beckett for the Defendant Foreman. This Defendant has always been ready to perform the agreement, but could not perform it by himself, or compel his co-partners to do so. He is therefore entitled to his costs as against the Plaintiffs, who may, perhaps, be entitled to recover them over against the other Defendants: *Jones v. Lewis* (b).

Mr. Holroyd for all the other Defendants. When *Bailey* became aware of the offer to sell the claim, he was bound to give the Defendants all the information he possessed as to the course of the reef, and the probable auriferous nature of the ground, as he must then have known what was the object of the enquiries which the Defendants had previously made of him. [*Molesworth, J.* Is there any evidence that if untruths were told by *Bailey* any of them were believed and acted upon by the Defendants?] In *Reynell v. Sprys* (c), Lord Cranworth says:—"It is impossible so to analyse the operations of the human mind as to be able to say how far one particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct." And further:—"The case is not at all varied by the circumstance

(y) 2 Giff., 201.
 (z) *Ib.*, 151.
 (a) 5 Hare 296.

(b) 1 Cox, 199.
 (c) 1 De G., M. & G., 708.

that the untrue representation, or any of the untrue representations, may, in the first instance, have been the result of innocent error, if, after the error has been discovered, the party who has innocently made the incorrect representation suffers the other party to continue in error, and act on the belief that no mistake has been made; this, from the time of the discovery, becomes in the contemplation of this Court a fraudulent misrepresentation, even though it were not so originally." The contract is only valid if entered into after full information: *Kay v. Smith* (d). This contract being founded on misrepresentation, the Court will set it aside *ab initio*: *Rawlins v. Wickam* (e). *Hutton v. Rossiter* (f). Intentional fraud on the part of the vendor is not necessary, as, if the misrepresentation be made through error or mistake, it will avoid the contract: *Slim v. Croucher* (g). The dictum of Lord Thurlow in *Fox v. Mackreth* was very much qualified by Lord Eldon in *Turner v. Harvey* (h), who says:—"As in the case that has been mentioned, if an estate has been offered for sale and I treat for it, knowing that there is a mine under it, and the other party makes no enquiry, I am not bound to give him any information of it; he acts for himself, and exercises his own sense and knowledge; but a very little is sufficient to affect the application of that principle. If a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." *Davis v. Cooper* (j). This is a suit by the purchaser for specific performance, and even if the case were such that the Court would not interpose to set aside the transaction for fraud, still the Court will not, by decreeing specific performance, assist the purchasers to benefit by their misrepresentations, but will leave them to their remedy at law: *Harris v. Kemble* (k), *Smith v. Reese River Company* (l). Even

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(d) 21 Beav., 522, 533.

(e) 8 De G. & J., 304.

(f) 7 De G., M. & G., 23.

(g) 2 Giff., 37.

(h) Jac., 128.

(j) 5 Myl. & Cr., 277-8.

(k) 2 Dow. & Cl., 463; S. C.,
5 Bli., N. S., 730.

(l) L. R., 2 Eq., 264.

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if the Court should be of opinion that the Plaintiffs are entitled to have the contract executed, it will decree it under the circumstances, without costs : *Burroues v. Hock* (m). This being a suit respecting a mining claim, the Plaintiffs should, to entitle them to sue, shew that they are the holders of miners' rights as required by the "Mining Statute 1865," sec. 246, but no evidence has been given of this: *Mackeprang v. Watson* (n), *Volunteer Extended Company v. Grand Junction Company* (o).

Mr. J. W. Stephen in reply. As to the objection that the Plaintiffs have not proved that they are holders of miners' rights, if the contract sought to be enforced in this suit be valid, then the Defendants are trustees for the Plaintiffs, and the Plaintiffs need not hold miners' rights. It was so held in the case of a mortgagor and mortgagee, in *Niemann v. Weller* (p). A suit for specific performance is not within any of the provisions of the "Mining Statute 1865," sec. 246. The Plaintiffs do not seek to "recover possession" of the mine, or "to recover damages," or "to obtain any relief as tenant in common, joint tenant, co-partner, or co-adventurer."

Cur. adv. vult.

April 27.
 —
Judgment.

MR. JUSTICE MOLESWORTH :—

The Defendants in this case are the present or past members of the Mount Egerton Steam Puddling Company. The company was possessed of a surface claim, worked not deep, and buildings and machinery. The claim was registered in the names of Messrs. *Foreman, Tanner, Chapman*, and five other Defendants. Before September, 1867, the date of the transaction in question, *Tanner* had sold to the Defendant *Russell*, and *Chapman* had sold to the Defendant

(m) 10 Ves., 470.

(n) *Ante*, Vol. II., Law, 106.

(o) *Ante*, Vol. IV., M., 6.

(p) *Ante*, Vol. III., Eq., 125.

Morris, having a lien for unpaid purchase money. But *Chapman* and *Morris* allege that, by consent, this agreement was cancelled after the transaction, and before this suit. The Defendants are *Morris*, *Foreman*, and six others interested, besides *Tanner* and *Chapman*. *Foreman* states his readiness to fulfil the contract in question.

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The Plaintiffs (five Messrs. *Learmonth*), of whom *Thomas* was the active member, claimed a mining lease from the Crown, September 28, 1862, not sufficiently traced or shewn to be subsisting; and a second lease, March 11, 1864, which noticed the claim of Defendants, and the ground of which bounded the claim on the north, west, and south. The Plaintiffs were mining in a quartz-reef within their ground, under the management, from May, 1867, of Mr. *Bailey*. The boundary between the Plaintiffs and Defendants was not accurately known to either, and there was some doubt if either, or which, party was entitled to mine in deep quartz under the Defendants' claim, but the Defendants' claim would, at all events, be a useful acquisition to the Plaintiffs seeking to mine under it.

In August, 1867, the Defendants' company began to wish to sell. About August 19, *Bailey* had put pegs on surface, indicating, as he thought, the extent of his workings. *Morris*, representing the Defendants, called on *Bailey* about September 5, and stated that he heard that the Plaintiffs were mining under the claim. *Bailey* shewed on the surface a place about over their then position, somewhat in advance of the peg, and said it was outside of the boundary. *Morris* thought the place indicated was twenty feet from the boundary, and used an expression not showing much confidence, "I am bound to believe you." On the same day there was some discussion as to the right to auriferous quartz if the claim contained it, shewing that both parties regarded it probable that it did. The Plaintiffs' lease was shortly after produced by *Bailey* to *Morris*

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and others, and there was some discussion as to whether the boundaries could be fixed from it. September 17, *Bailey* made a survey, and put in pegs on the surface as indicating his then position under ground, and conversed with the Defendant *Foreman* as to the Defendants' boundary, and called attention to the fact that the Plaintiffs' works were very near it, and asked him to communicate with the other Defendants on the subject, which he apparently did not. *Bailey* about the same time stated to some of the Defendants that the lead was dipping to the west, that is away from the claim.

On the 20th September was the first disclosure to *Bailey* of the Defendants being disposed to sell, by *Morris*, who came to offer the claim, machinery, &c., for £400. *Bailey* talked of this price as absurdly high, but requested *Morris* to reduce it to writing, to be shown to *Thomas Learmonth*, which was done, with a memorandum, "Offer open for a month." September 21, *Bailey* saw *Learmonth*, and urged him to purchase, saying that their works were near the boundary, and that it was probable that the reef went into the claim. He got *Learmonth's* authority to purchase for £400, but, hoping to get it cheaper, procured a letter from *Learmonth* as if written to him, saying the machinery was useless to *Learmonth*, and the claim valuable only for a waterhole, and authorising *Bailey* to give £200. September 24, there was a long bargaining between *Bailey* and most of the Defendants, in the course of which *Bailey* said he was authorised to give £200 only, and giving more would be exceeding his authority. By the letter produced he argued and asserted that there was no gold under the claim; said the claim would be useful to the Plaintiffs only for other purposes; that the Defendants were fools to refuse £200, &c.; but ultimately the Defendants carried their point as to price, and an agreement for the sale at £400 was executed by *Bailey*, *Morris*, and six Defendants, not *Foreman*, *Chapman*, and *Tanner*, and a cheque of *Lear-*

month for £20 was given as a deposit. *Foreman* signed this the next day. *Chapman* being asked by *Bailey* to sign, objected, but admitted that his only interest was for the balance of *Morris's* purchase-money. Said he would sign if the others did, but ultimately refused. *Bailey* represented to him that his refusal would stop the dealing. All the Defendants who signed (except *Foreman*) almost immediately repented of the bargain, and stated to *Bailey* their disinclination to fulfil it, and about October 1, returned the cheque in a letter. The Defendants' men shortly after began sinking a shaft on the claim, but the Plaintiffs have since carried on their mining from their own works under the claim, and October 7, 1867, had this bill for specific performance of the agreement, sealed.

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The Plaintiffs stand, I think, in the same position as *Bailey*, if acting for himself, would have done. It has been sought to establish by evidence of the position of the Plaintiffs' workings at certain times, and their subsequent rate of progress, and also from their position at certain times after the suit, that they had really gone far under the Defendants' claim, when *Bailey* represented that they had not encroached, and, therefore, that he must have wilfully misrepresented the facts. I am most influenced as to the state of his opinions on the subject by his conversations with *Learmonth*. I think that at and before the agreement he had passed the boundary, but did not know or believe it; but that in his conversations with the Defendants, he overstated his convictions on the subject; that he believed that the quartz reef ran under the Defendants' claim far, but merely as a speculative opinion, and mis-stated his opinion to the Defendants, and generally untruly disparaged their property; that he mis-stated his authority from his principals, and used some artifice to mislead the Defendants on the subject. But I think that all this does not disentitle the Plaintiffs to specific performance.

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I would refer for the law to *Story's Equity Jurisprudence*, secs. 191, 197, 199, 200, 201, and 208. All the parties knew that the gold followed by the Plaintiffs was approaching the boundary. Whether their workings had actually passed it was of little importance. Mr. *Spargo's* letter (Sept. 20) about the boundary shows the Defendants suspected the course of the gold. There is no evidence that the Defendants relied on *Bailey's* statements. Five of them were examined. Where a case should turn upon the operations of their minds, the parties are the best informed of all witnesses. Where a Defendant's defence is that he was deceived, he should be asked, as a witness for himself, if he was so. The only expression of reliance upon *Bailey* in Defendants' evidence, is in *Chapman's*, who was in fact no party to the bargaining. No doubt *Bailey* had peculiar means of information on the subject of the probable course of the gold, but the Defendants were quite aware that he had. Several of them had inspected the Plaintiffs' mine before, and there was no obstacle to their doing so again if they pleased. At the time of the statements about non-encroachment, the subject of purchase was not thought of by *Bailey*, and the statements he made about 24th September had reference to the difference between £400 and £200 price, as to which the Defendants got all they sought. As *Bailey* really had power to purchase for £400, his misrepresenting his instructions did not avoid his bargain. His telling *Chapman* that his refusal to join would annul the arrangement, was wrong in point of law, and therefore is no defence.

It has been argued that the doubt about the Defendants' boundary makes this bargain uncertain, and therefore not enforceable. I think this unimportant, in a bargain between persons having ground running up to a common boundary.

The subject of miners' rights was not noticed in the pleadings or evidence, but was referred to in argument by

Defendants' counsel. It is, as I understand, admitted that the Plaintiffs had not, and have not all miners' rights. I feel some difficulty upon this point, but am not prepared to dissent from the views of the full Court, that a mortgagee seeking redemption need not have a miner's right, *Salmon v. Mulcahy* (q), or a *cestui que* trust, seeking an account from a trustee, *McDougall v. Webster* (r). I referred to the subject in *Niemann v. Weller*. I think a suit for specific performance of an agreement to purchase a claim should come within the same principle. The 7th clause of the "*Mining Statute, 1865*," contemplates a purchaser of a claim taking an assignment of the miner's right of the seller. and consequently, it seems the case of a person not having a miner's right making a bargain for a claim which he can enforce. In the cases to which I have referred, the full Court seems to have thought that the Defendants should have had miners' rights, and I think here that I should presume that the Defendants registered for the claim, had them. I think that the Plaintiffs are chargeable with so much untruth as to *Bailey's* statements in this transaction, though not with fraud or deception, that I should make the decree without costs as between the other parties, giving *Foreman* his costs as against the Plaintiffs.

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"Declare that the Plaintiffs are entitled to specific performance of the agreement of the 24th September, 1867, in bill stated, for the purchase of the claim and other property therein referred to. Refer it to the Master in case the parties differ, to direct what acts and conveyances the Defendants respectively should do and execute to convey the said claim and property to the Plaintiffs. And upon the Plaintiffs paying the Defendants, or such of them as are entitled thereto, or paying into Court to the credit of this cause, the purchase money, £400, with interest thereon at the rate of £8 for every £100, by the year, from September 24, 1867, Order the Defendants respectively to do such acts and execute such conveyances, at the expense of the Plaintiffs, and to hand over to the Plaintiffs the chattel property comprised in the said agreement not already in the Plaintiffs possession and withdraw from the possession of the said claim. Order that the Plaintiffs pay the Defendant, *Charles Foreman*, his costs of this suit; refer it to the Master to tax the same; let the parties abide their own costs, save as aforesaid; liberty to apply."

Decree.

(q) *Ante*, Vol. III., Eq., 139.

(r) *Ante*, Vol. II., Law.

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Sept. 17, 18.
 Argument on
 Appeal.

From the above judgment the Defendants (other than *Foreman*) appealed to the full Court.

Mr. *Fellows* and Mr. *Holroyd*, for the Appellants, cited, in addition to the cases cited in the Court below—*Clapham v. Shillito* (s), *Cockell v. Taylor* (t), *Davis v. Symonds* (v), *Knight v. Bowyer* (w).

Mr. *J. W. Stephen* and Mr. *Webb* for the Plaintiffs, respondents.

Mr. *A'Beckett* for the Respondent *Foreman*.

Cur. adv. vult.

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 May 7.
 Judgment on
 Appeal.

THE CHIEF JUSTICE:—

Appeal from a decree for the specific performance of an agreement for sale by the members of the Mount Egerton Steam Puddling Company of their claim, plant, &c., to the members of the Egerton Gold Mining Company. The decree had been resisted, and the appeal was now supported, on the grounds that the Respondents (the purchasers) were not, at the time of the breach of the contract, holders of miners' rights, and that the Appellants (the vendors) had been induced to enter into that contract by fraud on the part of the purchasers' agent.

The claims of both companies adjoined, that of the Appellants being a small piece of land, forming portion of a large block; that of the Respondents including the whole block, less this portion. A lease of it had been granted to the Respondents. The Appellants worked theirs as a surface claim, extracting gold by the process

(s) 7 Beav., 146.
 (t) 15 *Ib.*, 103.

(v) 1 Cox, 402.
 (w) 2 De G. & J., 421, 444.

termed "puddling;" the Respondents theirs as a quartz claim, crushing the auriferous quartz it contained.

No evidence was given as to the holding of miners' rights by the members of either company. The Court has hitherto acted on the principle that in the case of trustee and *cestui que* trust—mortgagee and mortgagor for example—it is sufficient if the trustee or mortgagee hold a miner's right; it is not necessary that the *cestui que* trust in a suit to enforce his rights against the trustee should also hold, or have held one. This principle has been acted on and recognised on several occasions, and may, in our opinion, be applied to the case of a vendor and his purchasers, as in the present instance. So far as the Appellants themselves are concerned the Court will not presume either way, as to whether they did or did not hold these documents. We think, however, that assuming the question to be at issue between the parties, it lay on the Appellants taking the objection to show that although working a claim themselves they were doing so without the necessary title; if they were holders thereof their being so would, for the present, suffice to sustain the purchasers' rights, and for the purposes of the objection merely, we are not to presume the contrary.

Some days previous to any proposal for sale or purchase, and in consequence, apparently, of rumours that the Respondents had driven under the Appellants' claim, and were extracting auriferous quartz therefrom, one of their number was sent to make inquiries of the Respondents' manager, solely with reference to the supposed encroachment. No sale was then contemplated by either party. Fourteen days subsequently a proposal for sale was made by the same person to the Respondents' manager, and was finally accepted four days afterwards. The supposed fraud consisted in the untrue statements alleged to have been made by this manager before the offer, and repeated

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after that offer but before its acceptance. The Appellants contended that the offer had been withdrawn and another made, and that the untrue statements were repeated between the withdrawal of the one and the making of the other; but we can discover no evidence to sustain this view.

We think the vendors were not dealt candidly with. The purchasers' manager occupied a position affording him the means of forming a very accurate opinion as to the direction in which the quartz veins he was then actually working were in all probability trending; he can scarcely have failed, with his knowledge of mining and surveying, to have discovered that he had exceeded the limits of Respondents' claim, and that he must have entered on that of the Appellants. His directions to his workmen, his conversation with the active partner of the purchasers' company, and his urging on the purchase, all confirm the belief that he had profited by the advantages of that position. He did not, according to our view of the evidence, either before or after the offer, state fully and truly his own opinion on the facts, which must, as we think, have been within his knowledge; but those statements, before the offer for sale by the Appellants, were made in order to shew that he, as the Defendants' manager, had not encroached on the Appellants' claim—not to induce a sale, for none, as we have said, was then contemplated; and those repeated subsequently to the offer were in the hope of beating down the Appellants' demand of £400 as the purchase-money. This sum, however, was eventually paid to them.

For these statements the Respondents are no doubt answerable, but we can see no proof that the Appellants were in any way misled by them. Their own conduct negatives such a supposition. It is admitted that after the contract had been made, and after they had declined

to complete it, they sent one of their number with instructions, if he failed to get a better offer from a third person, then an intending purchaser, to obtain from the Respondents' solicitor, with the hope of another and more advantageous agreement being made, a stay of proceedings then threatened to enforce the contract. The stay asked for was granted, obviously under the supposition of the party granting it, that it would lead to the Appellants completing their contract. Meantime, whether they—the Appellants—had or had not been defrauded, was not the question, but whether they could obtain another valid offer for a higher price. Such an offer was obtained, the matter concluded, and they at once refused to carry out their agreement with the Respondents. Can there be a doubt, under such a state of things, that if this new offer had not been made, there would have been no further mention of fraud, and the contract would have been performed on the part of the present Appellants? Conceding that misrepresentations were made, they were not made for the purpose of inducing the vendors to enter into the agreement, nor was it, in our opinion, obtained in consequence of any such representations.

The Appellants, in addition to their objection on the ground of fraud, urged with much force, that even if the Court did not adopt that view, the Respondents should nevertheless be left to their redress at law—that their conduct disentitled them to any relief in a Court of Equity; and that it required less to resist a suit for specific performance than to set aside an agreement for fraud. We were much pressed with this suggestion. The circumstances of the case, however, are peculiar. The subject matter of the sale is a claim said to contain auriferous quartz veins. The value, in the abstract, of such a claim is difficult to be estimated. In addition to this difficulty, the Respondents hold on lease land in which shafts and drives have been sunk by them, and in such close proximity as to allow of

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the ground forming the Appellants' claim being worked therefrom. This circumstance renders that ground of special value to the Respondents, but it is a value for the loss of which a court of law could not afford adequate redress. We do not think the acts of the Respondents' agent have been of such a character as to compel us to deny his employers relief in this Court, and leave them to obtain inadequate compensation in another, for an admitted breach of a valid agreement.

The decree pronounced should not, we think, be disturbed; and as regards the costs of the Appellants, we are disposed to follow the course already pursued by the Court in pronouncing that decree, and for the reasons then assigned. The granting relief at all, in suits for specific performance, is in the discretion of the Court. In the exercise of that discretion it may be deemed right to decree specific performance, but subject to certain conditions. We think it right in the present case, to impose as a condition, the payment by the Respondents of their own costs. There is no inconsistency, we think, although so contended for at the bar, in granting the Respondents relief and yet refusing them their costs.

*Appeal dismissed without costs,
Respondents paying the costs of
the Defendant Foreman.*

1868.

November 9,
11, 18, 24.

1869.
May 7.

HASTIE v. CURDIE AND OTHERS.

JOHN HASTIE, by his Will, dated 23rd January, 1866, devised and bequeathed all his real and personal estate to four trustees, and proceeded as follows:—

“I direct that my trustees, as soon as it may be conveniently done after my decease, get in, sell, and convert into money, the whole of my said property, estate, and effects, and after payment of all my just and lawful debts, that the proceeds of the same be invested in Government securities, either of the United Kingdom of Great Britain and Ireland, or of the Colony of Victoria. And that my said trustees pay out of the annual income of the same, the following sums, namely: To my mother, *Mrs. Jane Hastie*, presently residing at Geelong, the sum of £200 yearly during all the days of her life, to commence and be computed from the day of the date of my death, and to be payable yearly, with a proportionate part thereof, up to the day of her own decease. To each of my sisters, *Mary Hastie* and *Margaret Hastie*, presently residing in Scotland, the sum of £50 yearly during all the days of their respective lives, to commence and be computed as directed in regard to the yearly sum payable to my mother, to be payable yearly, with a like proportionate part thereof respectively, up to the day of the decease of them respectively. To my brother, *George Hastie*, presently residing at Melbourne, the like sum of £50 yearly during all the days of his life, to commence and be computed as directed in regard to the other yearly sums payable to my mother and sisters, and to be paid yearly, with a like proportionate

A testator devised and bequeathed all his property to trustees to convert, and, after payment of his debts, to invest the proceeds in Government securities, and pay out of the annual income certain life annuities to relatives named, and directed that after the decease of the last survivor of such relatives his trustees should pay, assign, or make over the whole residue of his property, estate, and effects, and the securities on which the same should have been invested, as therein directed. There was a large surplus of income after providing for the annuities.

Held, that such surplus income was included in

the residuary gift; and that the Court would not, by anticipation, deal with the question of the destination of surplus income, on the contingency of the period allowed by law for accumulation being exceeded.

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part, up to the day of his decease. I direct that my said trustees set aside two sums of £1,000 each out of the moneys to be invested as aforesaid, and pay the annual proceeds of one of the said sums of £1,000 to my niece, *Mary Hastie*, presently living near Melbourne; and pay the annual proceeds of the other of the said sums of £1,000 to my niece, *Jane Hastie*, presently residing in Geelong, such annual proceeds to be paid to them, the said *Mary Hastie* and *Jane Hastie* respectively, yearly during the term of their respective lives into the hands of my said nieces respectively, for their sole and separate use and benefit, free from the control, debts, and engagements of any husband, and so that my said nieces respectively may not have power to alienate, dispose of, engage, or receive the same, or any part thereof, by way of anticipation. I direct my said trustees to pay to my overseer, *James Spruce*, if he be living with me or engaged in my service at the time of my decease, a legacy of £200 out of my said trust estate. And I direct my said trustees after the death of my mother to pay the following legacies, namely: To the treasurer for the time being of the Melbourne Hospital, for behoof of the said Hospital, the sum of £500. To the treasurer for the time being, or other proper officer, of the Melbourne Lunatic Asylum, for behoof of the Asylum, the like sum of £500; and to the treasurer for the time being, or other proper officer, of the Geelong Hospital, for behoof of the said Hospital, the sum of £300. And I direct that after the decease of the last survivor of my relatives hereinbefore named, my said trustees shall pay, assign, or make over, the whole residue of my property, estate, and effects, and the securities on which the same shall have been invested as hereinbefore directed, to the person or persons who shall constitute or be recognised as the heads respectively for the time being of the United Church of Great Britain and Ireland in the Colony of Victoria, and the Moderator and Moderators for the time being of the Synod or Synods, or other Supreme

Ecclesiastical Court or Courts, of such of the Presbyterian Church or Churches in the said Colony as recognise and approve of the principle of Church Establishment, or of a connection between the Church and State, and to the University of Melbourne, or to any or either of them, in such parts, shares, or proportions, as they, my said trustees, or the survivor of them, shall in their discretion and judgment think fit."

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The Will contained the usual trustees' clauses, and power of appointing new trustees, without any special reference to their power of selection between the ultimate donees of the residue. The trustees were appointed executors.

The testator died March 18, 1866, and probate was granted to three of the executors, reserving leave to the fourth to come in and prove thereafter. *Jane Hastie*, the mother of the testator, his sisters *Mary Hastie* and *Margaret Hastie*, and his nieces *Mary Hastie* and *Jane Hastie* survived him, but *George Hastie*, his brother, died in his lifetime. After providing for debts, legacies, and annuities, there was a large surplus income. *Mary Hastie*, the sister, 19th August, 1868, filed the bill in this suit against the trustees, the testator's next of kin, and the University of Melbourne, submitting that the whole of the surplus income was given by implication to the annuitants mentioned in the Will; or that, if such surplus should be held included in the residue, accumulation could not continue for more than twenty-one years from the testator's death, and that after that period the surplus would be distributable amongst the testator's next of kin, and prayed a declaration to that effect.

Mr. *J. W. Stephen* and Mr. *Webb* for the Plaintiff. There is no express gift of the surplus income, and the residue is not so given as to include it. By postponing distribution

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of the capital during the lives of the annuitants, the testator is presumed to intend the postponement for the benefit of the persons whose interests precede those of the ultimate takers. *Jarman on Wills*, 3rd ed., Vol. I., p. 497. The principle applies, although the person whose interest is postponed may not be the testator's heir-at-law or next of kin, although these circumstances strengthen the presumption. *Doe d Bendale v. Summerset* (x), *Bird v. Hunsdon* (y), *In re Blake's Trust* (z), *In re Betty Smith's Trusts* (a). We rely upon *Humphreys v. Humphreys* (b) as a direct authority in the Plaintiff's favour. In that case, as in the present, there was an express bequest to the person taking the life estate by implication, and who was not the testator's next of kin. But if the gift of the surplus income be included in the gift of the residue, the accumulation of it cannot be continued beyond twenty-one years from the testator's death. Although it is possible that the statutory limitation to accumulation may not be exceeded, if it appears that accumulation may continue beyond the period permitted, the Court will make a decree by anticipation deciding the right to income liberated by the direction ceasing to operate, as in *Bective v. Hodgson* (c). The operation of the "*Wills Statute*," which incorporated the "*Thellusson Act*," is not confined to cases in which accumulation is expressly directed, but applies to all cases in which the performance of the trusts would result in accumulation beyond the prohibited period. *Macdonald v. Bryce* (d). The Plaintiff, as one of the next of kin, would be entitled to a share in the surplus income after twenty-one years from the testator's death, and she is now entitled to have that right declared. The University of Melbourne is the only ascertained representative of the three beneficiaries amongst whom the power of election is to be exercised. It is impossible to say who the others will be

(x) 5 Burr., 2608.

(y) 2 Swans., 342.

(z) L.R., 3 Eq., 799.

(a) 1 Ib., 79.

(b) L. R., 4 Eq., 475.

(c) 10 H. L. Cas., 656.

(d) 2 Keen, 276.

at the time when the selection or division is to be made, and the answer of the trustees admits the impossibility, and that all parties who could be brought before the Court are before it.

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Mr. Gregory for the next of kin. There is no present gift of the residue at a postponed period such as would carry intermediate income not expressly disposed of, but the gift of the residue is in itself contingent. It is not merely that enjoyment is deferred, but there is no gift at all until the contingency arises, and there is therefore an intestacy as to all surplus income arising in the meantime, after providing for the annuities. *Stevens v. Hale* (e), *Genery v. Fitzgerald* (f), *Gibson v. Montfort* (g), *Glanvill v. Glanvill* (h), *Saunders v. Lowe* (j).

Mr. Forster, Mr. Bunny, and Mr. Holroyd, for the trustees, referred to *Lambert v. Thwaites* (k), *Colpoys v. Colpoys* (l), *Fonnereau v. Poyntz* (m), and *Barkedale v. Gilliatt* (n); and submitted that any present declaration as to accumulations would be premature.

Mr. Billing and Mr. T. A'Beckett for the University of Melbourne. The words of the residuary gift are sufficient to include surplus income, and being thus disposed of expressly, no question of gift by implication can arise. The principle of *Humphreys v. Humphreys* cannot be extended to a class of annuitants. If it were to be applied in this instance, the result would be to give the surplus income to the survivor of the annuitants, not to the annuitants generally, as the gift of the residue is deferred during the life of the survivor, and does not take effect as to a part as each annuitant dies off. The surplus income

(e) 2 Dr. & Sm., 22
(f) Jac., 468.
(g) 1 Ves., 490.
(h) 2 Mer., 38.
(j) 2 H. Bl., 1015.

(k) L.R., 2 Eq., 151.
(l) Jac., 51.
(m) 1 Br. C. C., 472.
(n) 1 Swans., 562.

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exceeds the aggregate amount of the specific annuities, which are of unequal amounts. The result of distributing the surplus income amongst the annuitants equally, would be inconsistent with the testator's intention, as ascertained from the express gifts, which are not equal. The separate use, and restraint on anticipation of the annuities expressly given, would not apply to the annuities given by implication to the same persons. The smaller property would be protected, the larger unprotected; and it cannot be presumed that such was the intention of the testator.

Mr. J. W. Stephen in reply.

Cur. adv. vult.

November 24. MR. JUSTICE MOLESWORTH (after stating the facts as above set out):—
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It has been argued on behalf of the Plaintiff and those in the same interest, that there is no disposition of the income of the investment over and above the annuities between the time of the investment and the death of the survivor of the relatives named, and therefore that the surplus income should go to the next of kin as undisposed of, or, according to a class of cases, that the postponement of the application until the deaths of these relatives indicates an intention to give them the benefit of the surplus income during their lives, which should be effectuated. It seems to me that the Will sufficiently shews an intention of the testator to dispose of the surplus income in the same way as the investments. Directing that the trustees should apply a portion of the income of the fund in their names, he could not be supposed to intend that they should receive only so much as they should apply; they could not, in fact, in some modes of investments receive part only of the dividends, &c., so as exactly to meet the exigency. Treating the investment on stock, &c.,

debentures, &c., and cash income, as arrived to their hands, he directs them, on the death of the survivor, to pay (a word suited for cash), assign (a word suited to stock), and make over (words suited to debentures), to the ultimate receivers, the residue of property and securities in which the same shall have been invested. This residue could hardly mean the entire investment, called a residue in regard to payment of debts, &c., which was to be immediately after his death, in fact before investment, nor be so called in regard to the legacies to charitable institutions, payable at his mother's death, but the word has an apposite meaning, treating investment and income as mixed, the latter being subject to deductions for annuities. It would be an unduly rigid construction to say that all he calls residue should be invested in securities. This is fortified by the entire frame of the Will, shewing an intention to dispose expressly of all he had—to give no personal benefit to the trustees—by his having specifically provided something covering their respective lives for all the relatives named, having left something to all next of kin (treating his brother *George* as alive and one of them, which the Will did); by his having guarded the provision for his nieces with restrictions, and not having so guarded incomes which, if they took anything by implication, or as undisposed of, would probably be larger (by inference from the Will itself) than the express provision.

It has been urged that no probable motive can be found for postponing the appropriation of the funds to the ultimate receivers, but to give an intermediate benefit by the income to his relatives—that more good could be done by the immediate application. The postponement might have proceeded from an anxious solicitude to secure these incomes, notwithstanding failure of securities, from a wish that the trustees should have longer experience as to the utilities of, or the necessities of, the various bodies named, before making their selection—from an opinion that more

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good could be done by the deferred application of a larger than the hasty application of a smaller amount; or, lastly, and perhaps most probably, from a hope that delay and augmentation would best preserve the memory of the benefactor. None of these motives are so improbable that they should be discarded, in surmising an intention for the testator.

His property is said to be of an amount far beyond the legacies and annuities given by his Will, and beyond what a person reading it, from the caution of specifically appropriating part of the *corpus* to his minor annuities, and postponing the payment of legacies to his mother's death, would conjecture; but it has been held that regarding the probable fluctuation during testators' lives, their Wills should not be construed by the entire amount of their properties when making them. I have, therefore, forborne to draw arguments from the amount of his property.

It has been urged on the part of the Plaintiff that the fund cannot accumulate under the "*Wills Act*," sec. 25, for more than twenty-one years from the death, and that I should regard the law on the subject to judge of the testator's intention in the Will. I know no authority for that.

I have been offered arguments as to whether the income should, after twenty-one years, go with the residue or to the next of kin, and have been urged now to express an opinion, but I decline to deal with this question. It may never arise, and when it arises the parties interested in the discussion may be more nearly ascertained by intermediate events. I have now before me nobody representing the parties to receive except the University of Melbourne, which may be excluded. I have not been referred to any case in which courts of equity have decided questions about accumulations for more than twenty-one years, until the time expired, except *Bective v. Hodgson* (o).

(o) 10 H. L. Cas., 656.

There the Vice-Chancellor had inadvertently made a decree directing accumulations until there should be a person entitled to real estate, which might not be for twenty-one years. The case was brought before the House of Lords and argued upon other grounds. This oversight was discovered and corrected, and the right to the income for twenty-one years being clear, was declared in the altered decree without objection.

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The words "shall have been invested" seem to refer to investments going on at the time of distribution, but I would say on the whole, that this Will contains no direction for investment, so that the property should accumulate by way of compound interest; but I take that to be an implied duty of trustees, as that of investment itself is without express direction. I am not disposed to direct accounts (the Plaintiff not wanting them to protect any present interest of hers) before the ascertainment of parties certainly interested. Nor am I disposed to give an opinion to the trustees as to their having a present power of selection. If they are advised to attempt to exercise it, those taking and those disappointed may litigate the matter. This Will presents questions as to whether new trustees will succeed to the power of selection; what persons may be intended as heads of denominations; how far they will take as trustees or be controlled in their application of funds; what religious bodies come within the descriptions—none of which I shall attempt to settle. The last seems especially difficult, and I have no party before me interested in the discussion. Subsequent events and the conduct of the trustees may prevent the necessity of all discussions on the subject.

As to costs, I am against the Plaintiff as to present rights sought, and think I cannot conveniently deal with her contingent future rights. In some cases upon the construction of Wills, people with little chance

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of success boldly bring forward equity suits, thinking they may gain, possibly, and if they lose will be indemnified for costs out of the estate *malo ridentes alieno*. I have hesitated in this case: on the whole I shall throw the costs on the estate, giving the trustees only costs between solicitor and client.

Decree.
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Declare that by the Will of *John Hastie*, in the Bill mentioned, the Plaintiff and his other relatives therein named are not entitled by implication to the surplus income of the investments thereby directed during their lives, and that the said surplus income is not left undisposed of, so as to go to the next of kin of the said testator. Direct the Defendants, *John Curdie, Daniel McKinnon, John Manifold, and Peter Manifold*, as trustees from time to time, to invest such surplus income in securities of the class directed in the said Will, so that the same may accumulate by way of compound interest, without prejudice to the rights of all parties, after the exercise of the power of selection contained in the said Will, and after the expiration of twenty-one years from the death of the said testator, and it appearing that the funds in the hands of the said Defendants trustees are fully sufficient to secure the amount payable to the Plaintiff, this Court declines to make any present order for accounts of the said estate. Order that the costs of all parties to this cause be paid by the said Defendants trustees out of the *corpus* of the trust funds, exclusive of the £2,000 appropriated to the security of the Plaintiff and the Defendant *Jane Hastie*. Refer it to the master to tax the said costs; the costs of the said trustees Defendants only, between solicitor and client.

Dec. 18, 19.
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From this judgment the Plaintiff appealed. The case was re-argued by the same counsel, for the same parties, before the full Court (*p*).

Cur. adv. vult.

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The CHIEF JUSTICE (after stating the facts).—

In order more readily to arrive at the question really in issue between the parties as to the proper construction of this Will, it may be well to dispose of the point of the testator's intestacy respecting the surplus income. All his pro-

(*p*) Coram, *Stawell, C. J., Barry, J., and Williams, J.*

perty, real and personal, is given to trustees; they are to sell and invest the proceeds. The investments must necessarily be made in the names of the trustees, who are expressly directed to pay certain sums out of the annual income; and, as a consequence, it must be taken that they are required to receive the whole of that income. The surplus in their hands they would, in discharge of their ordinary duties as trustees, invest in some way, selecting—it may be supposed—the same kind of securities as the testator himself had specified for the *corpus*. Thus the trustees, having, in their possession, invested in their own names on securities under the authority of the Will the whole of the estate, are directed to pay certain annuities and legacies, and on the happening of a certain event, give the residue to certain objects. No doubt arises as to whether the trustees have this income or not—they are in possession of it—the question is simply whether the testator, having given all to his trustees, and very clearly directed them in words large enough to carry capital and income, how to dispose of the *corpus*, has yet omitted to provide for the disposition of the accumulations during a certain intermediate period—whether, in fact, the clause amounts to a sufficient direction to pay the income to the residuary legatees. In the absence of any prohibitory words, we should have thought the general rule of interest following principal afforded a sufficient answer to the question. The concluding part of the sentence—“and the securities on which the same shall have been invested as hereinbefore directed”—cannot, for the reasons already stated, be limited to the first investment, since there were necessarily subsequent investments of the surplus income; nor, according to the strictest and most literal interpretation, can these words restrain the plain meaning of those immediately preceding. The whole residue of the testator's property, including, in our opinion, income as well as capital, and the securities on which it, or any part of it, might have been invested, were to go in a particular way.

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We have no doubt, therefore, the testator did not die intestate as regards this surplus income.

The fund in dispute consists of interest from the investments of the proceeds of real and personal estate. No dispute arises as to any difference in the application to the one estate or the other of the principle of a gift by implication; and according to the authorities, it seems now to be settled that no such distinction exists. The true question is whether there is an inconsistency in the Will, or a difficulty, amounting almost to an impossibility, of giving full effect to the various words and clauses it contains, and whether such inconsistency or difficulty would be removed by presuming a gift to have been made by the testator. If so, the law allows of such a presumption being made, but only in order to effect the removal mentioned, not to sustain mere conjectures as to the motives or reasons on which it is supposed the testator acted. Various elements in each case may contribute *pro* and *con* to justify or prohibit any such presumption—the testator postponing his heir taking that which would have been his by inheritance, or his next of kin receiving his share in property which would have belonged to him if undisposed of; the presumed gift either working or being supposed to prevent an intestacy; a specific bequest of part of a particular fund, the remainder of which was to pass only by implication; a clause against anticipation expressly imposed by the testator, from which the beneficiaries would be freed as regards any gift by implication; a residuary clause large enough to cover the fund in dispute—these and others may all assist in the arriving at a decision for the one side or the other; but it seems scarcely consistent with all the authorities to lay down any general rule which shall make the conclusion in any particular case dependent upon their absence or presence. Each case must be determined according to its own special features.

For the Appellant, three cases were not a little relied on—*Doe v. Summerast*, the facts of which do not bear much resemblance to those of the present; *Bird v. Hunsdon*, which was decided apparently to prevent an intestacy; and the comparatively recent decision of *Humphreys v. Humphreys*. The judgment in that case seems scarcely consistent with the chain of previous authorities. By the Will then under consideration, the residue was to be given to such of the testator's brothers and sisters as were living at the death of his widow—in default, to his nephews and nieces. There were legacies to his father and mother. In the judgment the question is asked, why the testator postpones until his wife's death the enjoyment of his brothers and sisters, *i.e.*, the enjoyment under his Will—for without it they would have taken nothing. If a testator stands, so to speak, between his heir or his next of kin and that which they would have inherited or received but for his Will, the reason for the question is obvious. In all such instances similar circumstances are present, and the answer must be the same; but where the person postponed is neither heir nor next of kin, the reason for the question is not so easily discovered, and the answer must depend rather on conjecture, varying with the varying circumstances of each particular case, than be a conclusion fairly deducible from a state of facts, some at least of which must be present in each case. Moreover, unless the question is suggested by an apparent inconsistency in the Will, and is not dependent merely on the peculiar views of the testator, the inability to give an answer does not favour the necessity for presuming a gift. As in the case of *Humphreys v. Humphreys*, the class from which the residuary legatees were to have been chosen by survivorship was ascertained; the difficulty, or even impossibility, of determining beforehand which of them might be alive at the death of the widow seems scarcely capable of causing any inconsistency in the testator's Will, or even affecting the probabilities as to his intentions; and yet it is

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specially assigned as one of the reasons for the conclusion. Taking the case as not opposed to the other decisions on the subject, still none of the facts which existed in it are present in this. The question asked there could scarcely be asked here, and it is the only one, apparently, which can be asked—why did the testator postpone the gift to these three objects of his bounty? If asked, various answers may be conjectured, but what the testator's real reason was it appears to us impossible to determine. As well might it be asked why did he select these three bodies as objects of his bounty, to the exclusion of his own relations. It can scarcely be said the bequest to the Appellant, in the form of an annuity, of a portion of the surplus income, furthers her view that an additional share in that very surplus was given her by implication.

As the testator has postponed, until the death of the survivor of certain of his relatives, the distribution of his estate amongst his residuary legatees, who are strangers, the question resolves itself into whether this postponement gives his relatives, by implication, a share as next of kin in the income arising meantime from the investments. We have no hesitation in expressing our opinion that it does not. But the case does not rest there. Courts have felt justified in presuming a gift, in order to avoid an intestacy; but we are invited to treat as undisposed of that which the testator has disposed of by his Will; in fact, to presume an intestacy as regards this surplus, in order to support the gift by implication. Nay, more, though the testator has expressly given a portion of this same fund, it must be presumed, it is urged, that he omitted to give any directions as regards the remainder. The various reasons against the presumption, however, need scarcely be referred to. We can discover none in its favour. We think it does not arise, and that the surplus forms part of the residuary estate.

It was also urged—apparently in anticipation of the Court's entertaining the opinion we have just expressed—that if the income was to accumulate, the excess over twenty-one years from the death of the testator would be void, and the Court should express an opinion to that effect. We think the matter has been sufficiently disposed of by the form in which the decree has been framed. When the case arises the Court will deal with it. Until then it would be premature, in our opinion, to do more than direct, as has been done, that the income be accumulated without prejudice to any rights that may arise on the events to which the decree refers. The appeal must therefore be dismissed.

It only remains to dispose of the question of costs. Many points admitting of much doubt must arise on this Will. Some of them relate to the next of kin, others do not; none except these questions of a gift by implication and excess of accumulations, have been referred to in the pleadings. It is competent for a Plaintiff to frame his bill in any way he may be advised, but if he does so in utter disregard of the estate, the Court ought not to overlook that circumstance in considering the subject of costs. The result of this litigation has been to leave the principal difficulties without any proper opportunity for adjudication respecting them, and the estate diminished by the costs of the suit. We do not feel at liberty to add the costs of the appeal, and as we see no reason why the successful Respondents should not receive theirs, we dismiss the appeal, with costs.

Appeal dismissed with costs.

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Dec. 4, 10, 21.

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May 7, 15, 20,
25.

September 2.

DAVIS v. THE QUEEN.

D. was Crown grantee of land purchased by him from the Crown in 1853, and described in the grant as, *inter alia* "bounded on the south by Wellington-street." At the time of sale a plan was exhibited, shewing Wellington-street

PETITION under the "*Crown Remedies and Liability Statute 1865*," No. 241, against the Crown, and Bill against the Board of Land and Works, by *Peter Davis*, Petitioner and Plaintiff.

as five chains in width. The Crown grant was in the usual form, no reference being made to this plan. In 1868, the Government advertised for sale the land in the centre of Wellington-street, as shewn upon the plan, leaving a carriage-way on each side. On petition and bill by *D.* against the Crown and Board of Land and Works to restrain this sale,

The Petition and Bill stated that in August, 1853, the Petitioner purchased, under a contract with Her Majesty's Government, two allotments, numbered 1 and 2, section 15, town of Melbourne east, contiguous to each other, allotment 1 having a frontage of two chains to a street, or thoroughfare, known as Wellington-street or parade.

Held, by the full Court, reversing *Molesworth, J.*, that by presumption of law, the land forming "Wellington-street" *ad medium filum viæ* passed to *D.* as the grantee of the adjoining land, and that the plan exhibited at the sale was admissible to shew what the words "Wellington-street" in the Crown grant meant; and interlocutory injunction granted to restrain the sale of the land forming the street, extending for the frontage of *D.*'s allotment, and from that frontage to the centre of the street, its width being deemed to be that shewn in the plan exhibited at the time of sale.

Held, also, that the Board of Land and Works were properly made Defendants, and that the petition would be defective if they were not parties, and demurrers by the Crown and Board of Land and Works overruled.

On a question of the construction of words, the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the Crown or a subject.

Per *Molesworth, J.*—Between vendor and purchaser, the latter purchasing some land on a plan exhibited by the former, has no right to insist that the vendor must dispose of the rest of his property according to the plan, unless his contract expressly refers to it. And *per totam curiam*, where the original contract has been carried into execution by deed, the Court will only consider the terms used in that deed, and the proper construction to be put on them.

Per *Molesworth, J.*—The 18 and 19 *Vic.*, Cap. lvi., sec. 5. does not give to imperfect or honorary contracts of the Crown a binding efficacy as against the Crown.

Leave to appeal to the Privy Council from the order for an interlocutory injunction, refused.

That deeds of grant of these allotments were issued December, 1853, in which allotment one was described as being bounded "on the south by Wellington-street bearing west two chains and on the west by Clarendon-street bearing north one chain twenty-five links." £1,770 was paid by Petitioner for allotment No. 1, and £1,460 for allotment No. 2. That at the time of such purchase Wellington-street was, and has continued to the present time to be, a large and spacious street, parade, or thoroughfare of the width of five chains, or thereabouts, and extending between the frontage of allotment 1 and the adjoining allotments on the north side of Wellington-street and the public reserve or park formerly called the Police Paddock, and now called Yarra Park, for a distance from east to west of three-quarters of a mile. That as evidence of the width of the parade the petitioner craved leave to refer to a plan made and exhibited by and on behalf of the Government at the time of the contract and sale, on which plan the streets mentioned in the grant were shewn, and according to which all the streets, including Wellington-street or parade, have continued to be used and known to the present time. That previous to such contract and sale a correspondence had taken place between the then Mayor of Melbourne and the Governor respecting the width of Wellington-parade, and that in a letter to the Mayor from the Colonial Secretary, of the 22nd March, 1853, it was stated that "it has always been the intention to continue the line of this parade in a due east and west direction from the Richmond corner of the Police Paddock at the one end to the south-east termination of Flinders-street at the other, and special care shall be taken that no private interest shall be allowed to interpose which may be adverse to the ultimate formation of the street in this manner;" and the petition alleged that the width of the parade at the Police Paddock was five chains. As further evidence of the width of the street, a letter of the Colonial Secretary, 25th September, 1854, to the Mayor, and

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accompanying plan, and a proclamation in the *Government Gazette* of the 2nd February, 1864, were referred to, in each of which the parade was described as of the width of five chains. That the plans exhibited at the sale represented Wellington-street as of such width, and was exhibited for the purpose of inducing purchasers to give large prices for the land, and the Petitioner gave his large purchase money solely on the faith of Wellington-parade being continued of the width shewn on the plan. That the Government had published a notification of their intention to sell land on the parade, thereby reducing the width of the street to seventy-two feet, and the effect of this sale would be to lower the character of the houses, and the neighbourhood, and interfere with the prospect from the Petitioner's land, and otherwise diminish the value of the property already sold. The petition charged that this intended sale would be a breach of the contract made by the Petitioner, by which he gave enhanced prices for his allotments on the faith that the street would remain of the width of five chains; that the Petitioner was entitled to have Wellington-street retained of the width that it was when he made his purchase, namely, five chains; and that any alteration of its width would be a breach of contract, and a violation of the 18 and 19 *Vic.*, cap. lv., sec. 2, and the 63rd sec. of the "*Constitution Act*;" and that the Petitioner was entitled to have the Defendant (the Board of Land and Works) restrained from selling any portion of Wellington-parade. The prayer was in the statutory form that right be done, and also for an injunction to restrain the Board of Land and Works from selling any portion of Wellington-parade.

The case now came before the Court upon a motion for an injunction as prayed. The Petition and Bill was verified by the affidavit of the Petitioner. There was also an affidavit by Mr. *Pinnock*, stating that he had bought two allotments of land in Wellington-parade solely on the faith

that Wellington-parade was five chains wide, and would be maintained at that width, and had since, in the same belief, expended £9,000 upon buildings upon such allotments; and that if the land were sold as proposed the value of his property would be very materially depreciated, and the general character of the neighbourhood lowered.

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In opposition to the motion there was an affidavit from Mr. *Morrah*, an Officer of the Crown Lands Office, stating that the prices obtained for the land in question in 1853 were fair and reasonable; that the piece of land called Wellington-parade had not been set apart for public or other purposes by Act of Parliament; that the land had been and was lying waste; that two years ago the Board of Land and Works proposed to sell the land, and advertised it for sale, but, on the application of the City Corporation, and their declared intention to make improvements on the land, it was withdrawn from sale; these improvements, however, had not been made; further, that the sale was only objected to by three of the owners of properties on the parade, and that the residences in the neighbourhood at present were not of a superior character. There was also an affidavit from Mr. *Tuckett*, of *Gemmell, Tuckett & Co.*, the Government auctioneers, that in his opinion the sale of the land as proposed would not lessen the value of the properties in Wellington-parade, but would enhance the value of such properties.

Mr. *Bunny* and Mr. *Davis*, for the Petitioner and Plaintiff, in support of the motion. By the 18 and 19 *Vic.*, Cap. lvi., sec. 5, the only power given to the Colonial Legislature to deal with land in the colony is as to "waste lands of the Crown," and these words are not applicable to land within the City of Melbourne. By the same section it is provided "that nothing herein shall affect any contract, or prevent the fulfilment of any promise or engagement made by or on behalf of Her Majesty with respect to any land." The

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Petitioner is therefore entitled to a fulfilment of the implied contract or promise of the Crown, that this street should be maintained of the width of five chains. In the Crown grant the Petitioner's land is described as "bounded on the south by Wellington-street." There is a latent ambiguity as to what "Wellington-street" is, and parol evidence being admissible to define it, the best evidence is the plan exhibited at the sale, which shews Wellington-street as of the width of five chains. *Taylor on Evidence* § 557, *Hodges v. Horsfall* (q), *Squire v. Campbell* (r), *Druce v. Denison* (s), *Doe d Hughes v. Lakin* (t). This street has been dedicated to the public for more than fifteen years and cannot now be alienated by the Crown for building purposes. The Petitioner purchased upon the faith of the representation made by the plan exhibited at the time of sale that Wellington-parade would be five chains wide, and is entitled to have it maintained of that width. *Rankin v. Huskisson* (v), *Peacock v. Penson* (w). [*Molesworth, J.* In a case in which I was counsel myself in March, 1855, but the name of which I now forget, the full Court held that after a sale of land upon a plan shewing other roads besides that to which the land in question had a frontage, the owner might shut up those roads if he pleased (x).] The correspondence between the Government and the Corporation amounts to an undertaking to keep this road open of the width of five chains. [*Molesworth, J.* That correspondence was with the Corporation. How does that confer any right upon the present Plaintiff?] He is one of the citizens represented by the Corporation; and the Government so far from interfering with his rights, ought to interfere by the Attorney-General, if necessary, for the protection of those rights. The grant to the Petitioner of the land purchased by him, bounded by Wellington-street, passes also by presumption of law the half of that street *usque ad medium*

(q) 1 R. & M., 116.
 (r) 1 M. & Cr., 459.
 (s) 6 Ves., 385.
 (t) 7 Car. & P., 481.

(v) 4 Sim., 13.
 (w) 11 Beav., 355.
 (x) *Vide Bradshaw v. Watson*,
 Vic. L. T., 92.

flum, Simpson v. Dendy (y), Berridge v. Ward (z); and it has been held by the Privy Council that the same principle is applicable to grants by the Crown; *Lord v. The Commissioners of Sydney (a).*

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Mr. J. W. Stephen, Mr. Lawes, and Mr. Webb, for the Crown, and the Board of Land and Works, *contra*. As regards the petition against the Crown, there is in this case no contract within the meaning of the "*Crown Remedies and Liability Statute 1865*," sec. 27, and therefore this petition will not lie. But apart from that Act, and treating the case as though between subject and subject, the Plaintiff has no equity to maintain this suit. There is nothing lying in contract between the Petitioner and the Crown. The whole question between them is concluded by the Crown grant; and the Petitioner is entitled to nothing but what his Crown grant gives him. The Crown grant is in the usual form, and of the land only, and there is in it no express or implied grant of Wellington-parade, *White v. Hill (b)*. The exhibition of a plan at the sale is only tantamount to a view of the property, *Fewster v. Turner (c)*, and where the written contract between the parties is silent as to the plan, the Court will not infer a contract from the exhibition of the plan: *Feoffees of Heriot's Hospital v. Gibson (d)*, *Squire v. Campbell (e)*, *Nurse v. Lord Seymour (f)*. Even if from the use in the Crown grant of the words "Wellington-street" as a boundary, there is an implied covenant to give a street, it would only amount to a covenant to give a street, and not an open expanse of five chains wide, called a parade; or if it be treated as a covenant, then, to give a parade five chains wide; in the now altered circumstances of the colony, and the necessity for using this land within the city for building purposes, such a covenant would not

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| (y) 6 Jur., N. S., 1197. | (c) 11 L. J., N. S., Chy., 161; |
| (z) 10 C. B., N. S., 400; 30 | 6 Jur., 144. |
| L. J., C. P., 218. | (d) 2 Dow., 301. |
| (a) 12 Moore, P. C. C., 472. | (e) 1 M. & Cr., 459. |
| (b) 6 Q. B., 487. | (f) 13 Beav., 254, 269. |

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now be binding. *Duke of Bedford v. The Trustees of the British Museum* (g). The present Petitioner cannot sustain this suit on the ground of a nuisance as for a threatened interference by the Crown or the Defendants with Wellington-parade as a public highway; for then the suit should be by information by the Attorney-General. *Attorney-General v. Sheffield Gas Company* (h), *Shelford on Highways*, p. 13.

Mr. Bunny in reply.

Cur. adv. vult.

December 4. MR. JUSTICE MOLESWORTH:—

Judgment.

This case comes before me upon a motion for an injunction to restrain the sale of land lying between the houses on Wellington-parade or street, and the Police Paddock or Yarra Park, for building purposes, according to the petition, as verified.

The Petitioner, Mr. Davis, states in his petition that under proclamation July or August, 1853, he purchased from the Crown, lands at the corner of Wellington-parade and Clarendon-street, which were conveyed to him by Crown grant 2nd December, 1853, described as to that fronting Wellington-parade as "bounded on the south by Wellington-street;" that he paid £3,240; that this Wellington-street was then, and still is, a large street, parade, or thoroughfare, of the width of five chains, extending from the frontage of the said allotment to the park north and south, and from east to west three-quarters of a mile; that before the sale a plan was exhibited to him and other purchasers, shewing the several streets, amongst others the said Wellington-parade, by that name, of the width of five chains; that before the sale, in March, in a correspon-

(g) 2 M. & K., 552.

(h) 3 De G., M. & G., 304.

dence between the Mayor of Melbourne and the Colonial Secretary, it was stated by the latter that it was intended to continue the line of the parade in a due east and west direction from the Richmond corner of the police paddock to the south-west corner of Flinders-street, and that special care should be taken that no private interest should be allowed to interpose which might be adverse to the ultimate formation of the street in that manner; that the above plan was exhibited for the purpose of inducing purchasers to give large prices for the land in regard to the width of the street or parade, and that he himself gave that large price solely on the faith of the street being continued in its full width; that there were subsequent publications and letters by the Government treating the street as of the above width; that the Government are now about selling the southern part of this street—or parade—so as to reduce its width to seventy-two feet, and to cause that space to be covered with streets and inferior houses, obstruct prospect, and much diminish the value of Plaintiff's property.

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As to the above several materials upon which the Petitioner relies, I have to say that a correspondence by the Government with the Corporation of Melbourne can give the Petitioner no rights. As to the plan exhibited before the Petitioner's contract, this is not a suit by a purchaser seeking to have a contract executed according to agreement, but a purchaser having a conveyance on which he rests his rights, and as to which he seeks no amendment or rectification. Apart from this somewhat technical objection, it may be considered settled law between vendor and purchaser, that the latter purchasing some land on a plan exhibited by the former, has no right to insist that the vendor must dispose of the rest of his property according to the plan, unless his contract expressly refers to it. The leading case on the subject, now of many years standing, is *Squire v. Campbell*, nearly similar to the present.

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In it the Plaintiff had taken, from public commissioners, a long lease of land abutting on a fine proposed street, relying on the plan, and sought to restrain the commissioners from erecting a statute obstructing that street, as inconsistent with the plan. The same point was decided by the Supreme Court here as between private individuals, as to a plan of intended roads, in the case of *Bradshaw v. Watson*, in 1854 (j).

This reduces the Petitioner's case to his deed of conveyance, the Crown grant describing his land as bounded by Wellington-street. In *Squire v. Campbell*, the description was, "on the north side of a new street then forming, called Pall Mall East, fronting towards the south on the said new street." This petition presents no definite statement as to whether, when, and how, Wellington-street or parade was dedicated to the public as a highway. If it was so before the grant, the word should be deemed to have been used in it merely as a description of a known locality, which, as a street, was public property, which no one could enlarge or diminish, and as to which the purchaser would have rights only as one of the public complaining of any nuisance as interfering with public rights. It would be as if any one sold property as abutting upon a street, which could not be held a contract about the street. The Petitioner's case would be better, treating it as not then dedicated Crown property which the Crown was naming as a street, and intended to dedicate; and in this respect, I think the Crown was bound between it and purchasers having lots so described, to reserve for them a street popularly so called, but not a street of five chains wide. I think the contract is to be sought within the grant, which affords no material as to the width of the street, or space to be left vacant. Suppose lands were sold as bounded by a park, would every purchaser have a right to insist that none of the park, as then in

(j) Vic. L. T., 92.

fact existing, could be used by the Government for any other purpose?

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The Petitioner has in argument brought forward a new view, that half the street passed by the grant of land abutting upon it, and have referred, in support of their argument, to several cases. In England, the real origin of highways is generally of great antiquity, and it is presumed, in the absence of explicit evidence, that they were dedicated to public use by owners of the land retaining the right to the soil; and an owner conveying land abutting on a highway is presumed to intend to grant half of it. The presumption was held to be so strong that in *Simpson v. Dendy*, the owner of land on both sides of a highway, conveying a farm at one side by measurements more or less as abutting towards that highway, together with the appurtenances, was deemed to pass his half of the highway. So in *Berridge v. Ward*, land with appurtenances was held to carry half a highway, notwithstanding reference to a plan omitting it. But the short history of our colony shews a different state of things. All its land was Government property, gradually sold by intended roads as boundaries, the Crown retaining the soil and management of the roads. I was referred also to a case from an adjoining colony, New South Wales, originating in a grant from the Crown when Victoria formed part of it—*Lord v. The Commissioners of Sydney*—in which it was held that a Crown grant of land, as bounded by a creek, not navigable, passed half the creek, because the creek was of no probable use to the Crown, and of much use to the grantee. This reason fails as to streets of which the Crown holds the legal estate, according to its usages, for the benefit of the public. I would add to the ground for the result of that case, that a creek variable in width of water would be a variable boundary at its margin, so that a fixed boundary should be sought at its centre.

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I cannot appreciate the force of the argument for the Petitioner, based on the provisions of the 18 and 19 Vic., cap. lvi. transferring Crown lands to the management of the colonial Legislature, "that nothing shall prevent the fulfilment of any contract, promise, or engagement, made by or on behalf of Her Majesty, with respect to any land, when such contract, promise, or engagement, should have been lawfully made before the Act should take effect." I cannot understand that this clause gives to imperfect or honorary contracts of the Crown a binding efficacy as against the Crown. I apprehend its meaning is, that Her Majesty, if desirous of fulfilling her previous contracts, promises, or engagements (I would say even though they were imperfect or honorary), might as against the local authorities, insist upon fulfilling them. I expressed this view in *Dallimore v. The Queen* (k), somewhat too concisely. The full Court, on appeal, page 44, appears scarcely to agree with me.

It is unnecessary to discuss whether the subject of this suit is a claim or demand under the "*Crown Remedies Act*," accrued since June, 1858. Upon that point the case of the *Mayor, &c., of Melbourne v. The Queen* (l), seems with the Petitioner.

I deal only with the legal rights of the Petitioner, and express no opinion upon his moral claims upon the Government. I refuse the motion. Costs to be costs in the cause.

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 —
Statement.

The case now again came before the Court upon the demurrers, put in respectively by the Crown, and the Board of Land and Works. The grounds of demurrer by the Crown were as follows:—(1) Want of Equity. (2) That the said Petitioner has not, in his said petition, made any case of a claim or demand within the meaning of part 2 of

(k) *Ante*, Vol. III., Eq., 36.

(l) *Ante*, Vol. IV., Eq., 42.

the "*Crown Remedies and Liabilities Statute 1865.*" (3) That it does not appear by the said petition that Her Majesty, as the vendor of the land therein mentioned, has come under any obligation, expressed or implied, not to sell the land therein mentioned or referred to as the Wellington-parade. The grounds of demurrer by the Board of Land and Works were:—(1) Want of Equity. (2) That it does not appear by the allegations of the said petition and bill, that this Defendant has any interest in the subject matter of this suit.

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Mr. J. W. Stephen, Mr. Lawes, and Mr. Webb, for the demurrers. As the questions raised are the same as have been decided upon the motion for an injunction, there will be no necessity for arguing the demurrers.

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Mr. Bunny and Mr. Davis in support of the petition and bill. We concur in this arrangement; but ask that the appeal, or appeals, on the demurrers may be joined with the appeal which has been already lodged against the judgment on the injunction.

Mr. J. W. Stephen. We have no objection to there being one order on both demurrers, but the appeal from the order refusing the injunction must necessarily be a separate one.

MR. JUSTICE MOLESWORTH:—I do not think I have power to join the appeals. The more convenient way would, perhaps, be to have the appeal on the demurrer argued, and if decided against the decision of this Court, an injunction might be moved for based upon that decision. These, however, are terms for the parties to make themselves. All I can do is to include the two demurrers in one order.

Judgment.

Demurrers allowed with costs.

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The appeal by the Petitioner and Plaintiff against the order refusing an injunction now came on to be heard (m).

Mr. Bunny, Mr. Fellows, and Mr. Davis for the Appellant.

Mr. J. W. Stephen, Mr. Lawes, and Mr. Webb for the Respondents, the Queen and the Board of Land and Works.

A preliminary objection was taken by counsel for the Crown, that the demurrers having been allowed and no appeal therefrom lodged, the suit was altogether out of Court; but upon an undertaking being given on behalf of the Petitioners that an appeal from the order allowing the demurrers should be lodged in due course, the arguments were allowed to proceed.

The following cases were cited, in addition to those cited in the Court below. For the Appellant:—*Shaw v. Wilson* (n), *Lyle v. Richards* (o), *Tulk v. Mozhay* (p), *Pigott v. Stratton* (q), *Barlow v. Rhodes* (r), *Murley v. MacDermott* (s), *Rex v. Wright* (t), *Jarvis v. Dean* (v), *Reg. v. The Inhabitants of the Tithing of St. Mark* (w), *Philips v. Treeby* (x), *Stirling v. Mailand* (y), *Newmarch v. Brandling* (z), *Randall v. Hoel* (a), *Tipping v. Eckersley* (b). For the Respondents, *La Tour v. Attorney-General* (c), *North British Railway v. Todd* (d).

Cur. adv. vult.

(m) Coram, *Stawell*, C. J.,
Barry, J., and *Williams*, J.
 (n) 9 Cl. & F., 556, 566.
 (o) L.R., 1 E. & I. App. 222.
 (p) 2 Ph., 774.
 (q) 1 De G., M. & G., 33.
 (r) 3 Tyr., 280; S. C., 1 C. &
 M., 439.
 (s) 8 A. & E., 138.
 (t) 3 B. & Ad., 683.

(v) 3 Bing., 447.
 (w) 11 Q. B., 877.
 (x) 8 Jur., N. S., 999.
 (y) 5 B. & S., 840.
 (z) 3 Swans., 99.
 (a) 4 De G., M. & G., 343.
 (b) 2 K. & J., 270.
 (c) 11 L. T., N. S., 563.
 (d) 12 Cl. & F., 722.

THE CHIEF JUSTICE :—

The Appellant was grantee of two parcels of land at East Melbourne, purchased by him from the Crown in 1858. One formed the allotment at the junction of Clarendon-street and Wellington-parade; the other, an adjoining lot, had a frontage to Clarendon-street only. The former was described in the deed of grant as, *inter alia* "bounded on the south by Wellington-street." At the time of sale a plan was exhibited on the part of the Government, showing these and other allotments fronting Wellington-street, and also shewing the street or parade as five chains in width. The Crown grant was in the usual form, no reference being made to this plan. From the time of sale up to the present date, Wellington-street continued a parade or thoroughfare, extending in width from the line of these allotments on the north, to Yarra-park on the south, about five chains, and in length from east to west a distance of about three-fourths of a mile. At the end of last year a sale of the land, forming about three-fourths in the centre of this street, leaving a carriage-way on each side, was advertised to be held. The advertisement was in the common form as a sale of Crown lands, at public auction, by the Board of Land and Works. A petition was presented to Her Majesty to restrain this sale, the Board being made a party, and the petition as regards them being treated also as a bill. An application then made for an injunction was refused; the present appeal was from that decision.

The Appellant rests his case on the plan describing the width of the street having been made so much a part of the contract as to allow of its being referred to; on the sale being a derogation from the character of the street as it was at the time; on the stoppage or diminution of the width of the street being a nuisance; and on the further ground that the grant to the Appellant of the land abut-

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ting on the street was also a grant of the land in front, forming part of that street *ad medium filum viae*.

The question of nuisance may, we think, be at once disposed of. If nuisance at all, it is one of a public, not a private, character—one which affects the Appellant as a member of the community, not as the grantee of either of these parcels of land; and one for which he must seek redress by some other proceeding, than a suit in equity merely as such grantee.

As to the other points, the original contract having been carried into execution by the deed, we must now consider only the terms used in that deed, and the proper construction to be put on those terms. There is no reference in them to the plan shewing the width of the street—no statement as regards that width. The expression “street” is used merely as descriptive of the boundary it forms—in that sense its width is unimportant. So long as it remains a street, of whatever width, it still answers the description given—namely “bounded on the south by Wellington-street.” The diminution of its width is no derogation from its character as a boundary, nor does that width form any part of the original contract, even if we were now at liberty to consider the terms thereof. In support of the express words of the contract, therefore, the width cannot now be regarded by the Court; it simply formed no part of it.

The last ground, however, urged in support of an injunction—that taken apparently for the first time during the argument in the Court before the Primary Judge—causes the whole case to present a different aspect. The question of whether, by presumption of law, the land forming the highway *ad medium filum viae* passes to the grantee of the adjoining land, as the Appellant now contends, has never, so far as we know, been raised in any of

the colonial Courts. The law, as expounded by the Courts at home, as well as in America, has been clearly stated by Mr. Chancellor *Kent* in his *Commentaries*, Vol. III. 433, part 6, section 52—"It may be considered as the general rule that a grant of land bounded upon a highway or a river carries the fee on the highway or the river to the centre of it, provided the grantor at the time owned to the centre, and there be no words or specific description to shew a contrary intent." This passage was quoted and approved of in the judgment pronounced in *Lord v. Commissioners of Sydney*, so frequently cited during this case. The law on the point, as between subject and subject, in Great Britain is therefore clear. That judgment is decisive, however, not merely as regards the application of this principle of law to a case of the grant of a parcel of waste lands of the Crown in the colony of New South Wales, described as bounded by a river, thereby extending by presumption of law the grant of the parcels in the deed to a grant of the bed of the river *ad medium filum aquæ*; but also as regards the far more important principle, that, upon a question of the construction of words, the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the Crown or a subject.

This principle of a presumption of law, arising in the cases referred to, is founded, apparently, on the unreasonableness of the grantor retaining that which, of no use to him, may yet prove of service to his grantee. The difficulty of determining the boundary between high and low water mark affords no ground for the establishment of the principle, for then it would have been limited to cases of land adjoining streams, whereas it is as generally applied to instances of land fronting highways. We need not refer to the absolute necessity of observing all those principles of law recognised in the courts of the mother country, more especially in that which constitutes our own

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appellate tribunal, unless, indeed, some special circumstances of the particular case render the principle inapplicable. In the present instance we can draw no sound distinction as regards the question under consideration, between the Crown, as trustee of the waste lands of the colony, and the private owner of any particular portion of land. There is no reason why, for any general purpose, the Crown should retain the freehold of the highways. The mere circumstance that in the early days of the colony roads were formed by a department of the Government, which superintended the expenditure of a vote from the public revenue, scarcely affects the question; for the management and formation of the highways may be in one, and the freehold of the soil in another. The principle has been as generally applied in a comparatively new country as it has in Great Britain. Having the power of granting this land, why should the Crown retain it? The formation of streets or highways, whether over suburban or country lands, constitutes a duty devolving on the collective body of ratepayers within the district, and not on the central Government. The whole tendency of legislation on the subject confirms this view. To hold that the Crown retains the soil and freehold in these highways, after it has parted with the lands which abut on them, would be in effect to say that either it was in the power of the Crown to divert to other purposes than those originally proclaimed, the land over which they were to run, or that it was its duty to form these highways and keep them in repair. To neither of these propositions do we assent.

We entertain no doubt on the abstract question, and can discover no sufficient reason for limiting the operation of the general principle to grants of lands bounded by streams. The special circumstances of the present case, however, render its application somewhat difficult. The terms of the grant imply that a dedication had been made

by the Crown to the public of the land forming this street; that dedication, if once made, could not afterwards have been withdrawn. To constitute a boundary, the street must have been then in existence. Its limits, moreover, must have been ascertainable, if not ascertained, for the Crown must have known the extent of land which it had so dedicated. If land had been conveyed in express terms, but by so general a description as half of a street, evidence would be admissible, in case of doubt as regards the parcels, to shew what land fell within the fair meaning of the terms used. So here, although no doubt exists as to one side, namely, that bounding the allotment granted, yet, if any arises as regards the other, evidence is admissible to shew its precise position. Thus the plan exhibited at the time of the sale may, in this view, be referred to, not to explain the deed or to add to the agreement embodied therein, but to shew what land passed thereby. Wellington-street is the description used—the same description only can be assumed in the grant arising by presumption of law. In consequence of the circumstance that at the date of the deed the width of that street had not been in any way marked on the land itself, a doubt arises as to what the words "Wellington-street" mean. In order to ascertain the half, the whole must first be determined, and evidence may be received with a view of determining it. If any evidence on the subject is admissible, none more cogent could well be received than the plan prepared by the vendor, and exhibited at the time of sale, on which the width of the street is clearly shewn.

The equity of the suit in its present form consists, apparently, in the grantee having been induced to pay a higher price from supposing that the street would be maintained of the width represented by the plan. The case is scarcely put by the pleadings in the way it is now presented to the Court, and, according to which, as it is urged, the injunction ought to be granted. We think,

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however, that sufficient facts have been disclosed to call on the Court to interfere and prevent, at least until the suit has been finally disposed of, the vast amount of litigation which might otherwise arise.

The appeal will be allowed, and an injunction issued, but it must be limited to the land forming the street, extending for the frontage of the allotment granted, and from that frontage to the centre of the street, its width being deemed to be that shewn in the plan exhibited at the time of sale. Costs of the injunction to be costs in the cause. Appeal allowed accordingly, and with costs.

May 15.
 Appeal
 on Demurrers.

The appeal from the order of Mr. Justice *Molesworth* allowing the demurrers in this cause, which appeal had been lodged subsequently to the conclusion of the appeal sittings in December, 1868, now came on to be heard.

Mr. *Bunny*, Mr. *Fellows*, and Mr. *Davis*, for the Appellant, relied upon the judgment of the Court upon the prior appeal from the injunction motion.

Mr. *J. W. Stephen*, Mr. *Laues*, and Mr. *Webb* for the Respondents (the Crown and the Board of Land and Works). The judgment of the Court upon the injunction proceeds upon the ground that the Crown grant to the Plaintiff of the land he purchased, carried with it an implied grant of the road in front of it, *ad medium filum viae*. If so the Plaintiff has a legal title to the land, and the case is reduced simply to a bill to restrain a stranger from selling land of which the Plaintiff is legal owner, for which there is no precedent. The purchaser in such a case would take nothing; and if the possession of the land were interfered with, the Plaintiff's remedy would be at law. But we submit that the decision that the site of the road passes to the adjoining owners is inconsistent with the

legislation relative to Crown lands, as by Acts No. 145, sec. 43, and No. 237, sec. 36, the land over which any road passes, is treated as still vested in the Crown. At all events, the order allowing the demurrer by the Board of Land and Works should be affirmed, as they have no interest in the land, and are merely acting ministerially on behalf of the Crown.

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 —
*Argument on
 Appeal.*

Mr. *Bunny* in reply.

Cur. adv. vult.

The Crown and Board of Land and Works now moved (e) for leave to appeal to the Privy Council from the order on appeal on the injunction motion.

May 20, 25.
 —
*Leave to
 appeal to
 Privy Council.*

Mr. *Webb* for the motion. The Order in Council regulating appeals to the Privy Council (f), gives power to the Supreme Court "at its discretion" to allow an appeal from an interlocutory judgment. The Crown, to avoid delay, are desirous of appealing from the judgment on the injunction motion, which involves precisely the same points as the demurrer. Besides, the costs of the appeal on the injunction motion are given to the Petitioner absolutely by the order of the full Court, and in order to recover those costs, an appeal upon the injunction motion is necessary. The Crown ask that the payment of these costs may be stayed pending the appeal; or, that if paid, security may be given by the Petitioner for their return, in the event of the Privy Council so ordering, as was done in the case of *Keule v. The Queen* (g).

Mr. *Bunny contra*. The Court will never grant an application to stay payment of costs—*Archer v. Hudson* (h). This Court, before a single judge, has no jurisdiction to regulate proceedings as to an appeal from the full Court.

(e) *Coram, Molesworth, J.*

(g) *Ante*, Vol. III., Eq., 141.

(f) *Vic. Stats.*, Vol. III., p. 624.

(h) 8 *Beav.*, 321.

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The application should have been made to the full Court itself whilst sitting. If, however, the appeal be allowed, then I ask that the £500 security required from the Appellant, may be ordered to be paid into Court; and that no security should be required from the Petitioner for the return of the costs ordered to be paid to him.

Mr. Webb in reply.

Judgment.
 —

MR. JUSTICE MOLESWORTH:—I think this is an application which I ought not to allow. I think I ought not to impose upon the Privy Council the trouble in this case of hearing an appeal from a mere interlocutory order. I refuse the motion on the ground that the order sought to be appealed from, is a mere interlocutory order, and that the result of the appeal may or may not be final in determining the case between the parties, inasmuch as there are other questions involved than those which this interlocutory application deals with. As to the costs ordered to be paid to the Petitioner, those costs cannot exceed £50, which is considerably within the amount authorising an appeal; and also there is a general principle that no appeal will lie for costs. I may observe that the full Court has done in this case, that which in another case they expressed an opinion ought not to have been done, granted an injunction, pending the determination of the Court upon a demurrer (*j*).

September 2.
 —
*Judgment on
 Appeal on
 Demurrers.*

THE CHIEF JUSTICE now read the judgment of the Court upon the appeal from the order overruling the demurrers:—

In our judgment on the Petitioner's application for an injunction, we have fully expressed our views as to his right to relief in a suit framed for the purpose. We see

(*j*) *Vide* Atty.-Gen. v. Scholes, 30th Sep., 1868. *Ante*, Vol. V., Eq.

no reason to doubt their correctness, and, if correct, we think they substantially dispose of this case.

The clauses of the Land Acts of 1862 and 1865, to which we were referred as being inconsistent with those views, may, in our opinion, be explained so as to reconcile both; and even if they are not susceptible of a satisfactory explanation of the kind, the inconsistency, it is admitted, does not determine the question.

It was urged that as there were two demurrers, one by the Crown and another by the Board of Land and Works, and as the Board were not interested in the subject matter of the bill, they were entitled to our judgment on their demurrer. We cannot, however, accept this argument. The substantial rights of the Crown to the waste lands have been ceded by statute, the Crown remaining merely a trustee. The sale and disposition thereof have been entrusted to the Board, by the Parliament of the country. They are the sole agents as regards these lands. The act of which the Petitioner complains was initiated by them; their published intentions to sell rendered the suit necessary; and without them the Crown could not legally move in the matter. We think the petition would be defective if they were not parties, and that as against them there is, according to our views, unquestionably an "iota of equity."

We think both demurrers should be overruled. Costs to be costs in the cause. The appeal will be allowed with costs. Deposit returned. The Respondents to have a month's time to answer.

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*Judgment on
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1869.

May 20, 25.

Land was conveyed to such uses as *E. C.* should with the consent of her husband *B. C.*, appoint. *E. C.* became lunatic. *E. C.* being desirous of effecting a mortgage, applied for an order under the "*Lunacy Statute*," authorising the Master to consent on behalf of the lunatic.

Held, that so far as regarded the beneficial interest of the lunatic, the application should be under sec. 173, and either by the committee or the Master; and that, as to a power vested in the lunatic where he had no beneficial interest, the committee only could give the consent under sec. 174, and not the Master. Sec. 143 does not apply where the consent of the lunatic is required for the protection of the rights of third parties.

IN THE MATTER OF ROBERT CLELAND, A LUNATIC.

BY deed dated 18th September, 1867, between *Mark Moss* of the first part, *Robert Cleland* of the second part, *Eliza Cleland*, his wife of the third part, and *John Spark Woolcott* of the fourth part. *Moss*, for valuable consideration, conveyed certain land by *Cleland's* direction to *Woolcott* and his heirs, "to such uses and for such estates and interests as *Eliza Cleland* should with the consent of her husband *Robert Cleland* during his life and after his death by any deed or by will appoint and in default of appointment to the use of *Woolcott* during the life of *Eliza Cleland* for her separate use and after her death to the use of *Robert Cleland* and after the death of the survivor to the use of the children of their marriage in equal shares as tenants in common in tail." The deed contained a power of appointing new trustees, but no leasing or other powers. By a deed of the same date as the preceding deed, *Eliza Cleland*, with the consent of *Robert Cleland*, exercised her power of appointment in favour of the trustees of a building society by mortgage to secure £720, out of which the £363 was paid to *Moss*, and the balance was afterwards expended in building on the land. *Robert Cleland* was admitted as a lunatic patient to the Yarra Bend Asylum on the 8th day of May, 1868.

The Master in Lunacy, by a report dated the 19th of May, 1869, certified that a state of facts and proposal had been filed in his office on behalf of *Eliza Cleland*, by which she proposed to exercise her power of appointment, by executing a new mortgage of the land, applying the mortgage money in paying off the balance due on the old mortgage and in building upon the land; and that such

appointment should be made, with the consent of the Master, in the name and on behalf of the lunatic. The Master further reported that the consent of *Robert Cleland* to the exercise of the power was given as a check upon the undue exercise of such power, and that it would be for the benefit of *Robert Cleland* and his family that the power should be exercised in the manner, and for the purpose, proposed. No committee of the lunatic's estate had been appointed.

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Statement.

The case now came before the Court, upon the Master's report, and on the petition of *Eliza Cleland*, verified by affidavits from which it appeared that she was supporting the lunatic and his family by her own property and industry; that the proposed mortgage would be beneficial; and that the ultimate recovery of the lunatic was improbable. The Master had, under section 115 of the "*Lunacy Statute*," reported without a prior reference.

Mr. *Worthington* moved for an order authorising the Master to give the necessary consent, on behalf of the lunatic husband, to the exercise of the power. Section 174 of the "*Lunacy Statute*" gives the Court jurisdiction to make an order authorising the committee to give the required consent, on the application of the person interested; and, under section 143, the Master has, in respect of the property and estate of any lunatic patient, in addition to general powers, the like powers, subject to the like limitations, as the committee. The land as to which the appointment is sought is "estate and property" within the meaning of section 143, "estate" not being limited to beneficial estate; and the lunatic's beneficial interest in reversion comes within the definition of "property." The Court has, therefore, jurisdiction to make the order, under the combined operation of the two sections 143 and 174.

Argument.
—

Cur. adv. vult.

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In re
CLELAND.

May 25.

Judgment.

MR. JUSTICE MOLESWORTH :—

The arrangement proposed by the Petitioner in this case, would appear to be judicious and reasonable, and for the benefit of all parties. But the question is, whether I have jurisdiction under the "*Lunacy Statute*" to make the order sought. The consent of the husband has two different aspects. One as a protection to his life estate in remainder; and so far as that goes, it is a consent which is required for his own protection. It is also necessary before defeating the estate of his children in remainder; and so far he may be regarded as a kind of protector of the settlement. Section 173 is the one which relates to the beneficial interest of the lunatic; but under that section, the order is to be made upon the application of the committee of the estate. This is not an application of the committee, nor of the Master, who might be taken to stand in the same position under section 143; and for this reason I do not think I can make the order, as upon the footing of the beneficial interest of the lunatic. Then comes the 174th section, providing that the committee may exercise a power vested in the lunatic where he has no beneficial interest; and if a committee had been appointed, I think an order might be made under that clause. But it is sought here to substitute the Master for the committee, acting under that section, by virtue of the 143rd section. That section, however, is limited to power "in respect of the property and estate of any lunatic patient," and does not, I think, apply to the case in which the consent of the lunatic is required for the protection of the rights of third parties. For these reasons I do not think the application can be granted under either of these clauses.

Motion refused

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1869.

May 25, 28.
June 14.

JOHN GOW, moderator of the Presbytery of Melbourne, sent the following application to the Colonial Secretary, 29th May, 1852:—"I do myself the honour respectfully to solicit, on behalf of the Presbyterian families resident in the eastern part of the city of Melbourne, that His Excellency the Governor, with the advice of the Executive Council, may be pleased to grant to them two acres of land in that locality, as a site for a church and school and minister's dwelling—viz., Allotments 1, 2, 3, 16, 17, 18, 19, and 20 of Section 9, East Melbourne; 16, 17, 18, and 19 for the church, 1 and 20 for the minister's dwelling, and 2 and 3 for the school." This application was answered, 15th June, 1852, by the Colonial Secretary as follows:—"I have to acknowledge the receipt of your letter of the 29th May, soliciting on behalf of the Presbyterian Church the grant of two acres of land in East Melbourne as a site for the erection of a church, schoolhouse, and minister's dwelling, in connection with that denomination. In reply, I am directed to inform you that His Excellency has been pleased to sanction the appropriation of the land to the purposes in question, and I have to request that you will place yourself in communication with the Surveyor-General, in order that the necessary steps may be taken to that effect." Trustees were nominated and approved of by the Governor-in-Council on the 18th August, 1853, but no grant was issued. The land was fenced in by the trustees,

The Moderator of the Presbytery of Melbourne applied 29th May, 1852, to the Government for a grant of Crown land as a site for a church, schoolhouse, and manse. This application was assented to on behalf of the Governor by letter of 15th June. Trustees were appointed, and approved by the Governor-in-Council 18th August, 1853. The land was taken possession of and fenced, and a schoolhouse erected on part of the land. The remainder was not used for a church or manse, but buildings were erected upon it in 1855, which were

let by the trustees, and the rents applied to general church purposes. No grant was issued by the Crown, and in November, 1868, the Board of Land and Works advertised for sale, under section 40 of the "*Land Act 1862*," the land not occupied by the schoolhouse. On petition and bill by the trustees against the Crown and the Board of Land and Works, seeking to restrain the sale,

Held, following *The Mayor, &c., of Melbourne v. The Queen*, that the promise to give the land in trust for a particular purpose, and acts done by the trustees in pursuance of the purpose, did not entitle them to enforce the promise as a contract; that the Petitioners had no case as to any part of the two acres; and petition and bill dismissed with costs.

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 —
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and a school was built upon the Allotments 2 and 3. The school was for some time used as a church on Sunday. No church or minister's dwelling was built upon the other part of the land comprised in the application, but a number of wooden buildings were put upon it in 1855, which were let to different tenants, and the rents received by the trustees and applied to the general purposes of the church. In November, 1868, the Board of Land and Works advertised for sale, under Section 40 of the "*Land Act 1862*," a part of the land reserved for the church and minister's dwelling. Thereupon the trustees filed a petition and bill against the Queen and the Board of Land and Works, praying (upon different grounds set out at length in the judgment) that right might be done, and the Board be restrained by injunction from selling the land. The suit now came on for hearing.

Argument.
 —

Mr. *Atkins* and Mr. *Bunny* for the Plaintiffs.—The application and answer did not bind the trustees to appropriate the specified allotments to the specified purposes. The consent given on behalf of the Crown makes no distinction between different allotments for different purposes, but gives the whole two acres for one entire object—the building of church, school, and minister's dwelling. The three buildings are incidental to one another, and form the ordinary church establishment. Their erection was the consideration for which the land was given, and the building was begun within a reasonable time. No time was fixed within which the buildings were to be put up; and if the gift of the land can be revoked now on the ground that the buildings have not been completed, it might have been revoked at any time, and although all three buildings were in course of erection. The Crown has acquiesced in the expenditure upon the school alone, and gave no notice of an intention to resume occupation unless the church and minister's dwelling were also proceeded with. This acquiescence makes the threatened

sale inequitable as against the Plaintiffs, and gives them a right to restrain it. *Ramsden v. Dyson* (k). Under the "Constitution Act," 18 & 19 Vic., cap. lv., the Government have only power to deal with waste lands of the Crown; and waste lands as defined by 5 & 6 Vic., cap. xxxvi., sec. 23, do not include lands which have been contracted to be granted, or dedicated and set apart for some public use. This land had been so contracted to be granted and dedicated and set apart when the "Constitution Act" passed, and no right to sell it could, therefore, have been given by local legislation. The land is also protected from sale as set apart within the meaning of secs. 5 & 6 of the "Land Act 1862."

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Mr. J. W. Stephen and Mr. T. A'Beckett for the Defendants.
—No promise to dispose of Crown lands can be effectual and enforceable against the Crown unless under seal. *Dallimore v. The Queen* (l). A promise to give land to trustees for a public purpose is a promise without consideration to support it, and is not enforceable as a contract, though the trustees may do acts to carry out the purpose on the strength of the promise. *The Mayor, &c., of Melbourne v. The Queen* (m). But if the letter written by the Colonial Secretary in answer to the application is to be treated as a contract, the Plaintiffs have failed to perform their contract. The application distinctly appropriated three plots of land to three distinct purposes, and only one of the three purposes has been accomplished; and as to the others, the lands reserved for them have been applied to different and inconsistent purposes. The Crown never intended or threatened to sell any part of the land reserved for school purposes; and although the bill makes that case, it is denied by the answer and contradicted in evidence.

Mr. Atkins in reply.

Cur. adv. vult.

(k) L. R., 1 E. & I., App., 129. (l) *Ante*, Vol. III., Eq., 18.
(m) *Ante*, Vol. IV., Eq., 19.

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June 14.

Judgment.

MR. JUSTICE MOLESWORTH:—

On the 29th May, 1852, the Rev. *John Gow*, on behalf of the Presbyterian Church in Victoria, applied by letter to the Governor for a grant of two acres of land in East Melbourne, as a site for the erection of a church, school-house, and minister's dwelling, in connexion with that denomination, distinguishing different contiguous allotments for each of the three specified objects. This was answered by an official authorised by the Governor, 15th June, 1852, in a letter sanctioning the appropriation of the two acres to the purpose in question, and directing Mr. *Gow* to communicate with the Surveyor-General, in order that the necessary steps might be taken to that effect. The Surveyor-General appears to have prepared maps accordingly, marking the appropriation according to previous surveys. The Presbytery of Melbourne selected the Petitioner Mr. *MacPherson* and several others to be trustees of the Presbyterian Church, East Melbourne, which fact was communicated to the Governor by letter, 9th June, 1853, and the appointment was confirmed by the Governor in Council, 18th August, 1853. No point has been debated about the sufficiency of this appointment of trustees, or of the right of the Plaintiffs succeeding some of them to be trustees, and the provisions of the Act 8 Wm. IV., No. 7, on the subject have not been commented on. These trustees took possession of the two acres, and they or their successors remained in undisturbed possession until last year, when the Board of Land and Works intimated an intention of selling part of the land for other purposes. They received about £500 subscriptions in 1858 for a school house, and with it, and moneys granted by the Government, built it on the part of the land appropriated to it. That schoolhouse has been used for its proper purpose, and was also from its completion until it was brought under the "*Common Schools Act*" used upon Sundays as a Presbyterian Church, to which I see no

objection, if its use as a school was not impeded. The trustees set about turning the rest of the two acres to profit since 1855, let it at rent to numerous persons who built and occupied small temporary houses upon it, and treated those rents as mixed up with their general trust funds; fenced-in the two acres, built a schoolmaster's house, kept the school in repair, and accumulated the overplus for the erection of a minister's house and church, so that the accumulation is £1,400 or so. The Act 8 Wm. IV., No. 7, applies to lettings of glebe lands after grants to trustees and the appointment of a minister, and not to lettings like the present, so does not legalise these lettings. The matter was done without concealment, and without objection by the Government, and the land might as well be so used as left idle; but I do not think it should be supposed to be the meaning of such grants that religious bodies should turn their lands to profit, raising no subscriptions, deferring the erection of churches, &c., so long, and until the accumulation of profits should form a fund for their buildings. The trustees seem to have been stirred into activity as to building a manse, only by the disposition of the Board of Land and Works to sell the land.

This petition against Her Majesty, and bill against the Board of Land and Works, makes a case on the following grounds:—That by the letter 15th June, 1852, a promise was given, or contract entered into, binding the Queen to issue a Crown grant to trustees when appointed, and should now be carried out; that these lands were by the proper authorities reserved and set apart for charitable purposes within the statute 43 *Eliz.*, and a Court of Equity should protect the interest of the trustees though not having the legal estate, and supply the want of valuable consideration in a suit to carry out charitable trusts; that at the time of the passing of the 18 & 19 *Vic.*, cap. lvi., and the "*Constitution Act*," the land had been lawfully promised and contracted to be granted, and dedicated and set apart for

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public use, and therefore was not waste lands of the Crown within the last-mentioned Acts or the Acts 5 & 6 Vic., cap. xxxvi.; and therefore neither the Legislature of Victoria nor Board of Land and Works have power to sell it; that at the passing of the "*Land Act 1862*," this land had been promised and set apart for the purposes mentioned in section 5 of that Act, and possession given thereof, and trustees appointed, and therefore the Board had no power to sell, but the Governor should convey to the trustees; that the Board is exceeding its powers in selling; that the Government and Board allowed the trustees to treat the land as belonging to them in equity, and expend money thereon without notice; that the Board denied their title, and therefore the Board should be restrained from disturbing them. As a petition this closes with the prayer that right be done against the Crown; and as a bill, prays that the Board be restrained by injunction from selling.

The 48 *Eliz.* relates to the enforcement of the charitable trusts for which lands are granted, not to the enforcement of a promise to grant. The Act 5 & 6 Vic., cap. xxxvi., defines waste lands of the Crown to be those not granted or lawfully contracted to be granted or dedicated and set apart for some public use—that is, I apprehend, effectually granted, contracted, dedicated, or set apart. The Act in question authorises the Governor to sell the waste lands in manner therein specified, and not otherwise; but provides (section 3) that nothing in it shall prevent the Queen, or any person acting by her authority, from excepting from sale and reserving to her, or disposing in such manner as for the public interest may seem best, lands required for public purposes, including sites for public worship, schools, &c. This section does not describe the means by which the Governor, taking him to be a person acting by the Queen's authority, might dispose of lands for the public interest. The Orders in Council, March 1847, are

similar as to right to reserve. I expressed an opinion in *Dallimore v. The Queen* that the Crown lands could be bound only by grants under seal or conveyances exactly conformable to Acts of Parliament authorising them. The full Court seemed inclined to dissent from my view as to exact conformity to Acts authorising them. The present is a case in which the Crown is sought to be bound by a promise made by the Governor to a temporary religious president of the Presbyterians, that land should be given to trustees, afterwards to be nominated, for a church, manse, and school, for the use of members of that persuasion for ever, without condition; for the Petitioners seem driven to press their case to that extent. The land might be wanted or not; nobody was bound to do anything about it; but this, they argue, created a charitable trust, therefore unalterable, which no one could determine. The importance of requiring grants or formal documents, the result of care and circumspection, to bind Crown lands could not be more proved than by the absurd consequences which would follow from making a mere promise binding as in this instance.

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The 18 and 19 *Vic.*, and "*Constitution Act*" repealed 5 and 6 *Vic.*, cap. xxxvi., and gave the entire management and control of the waste lands of the Crown to the Legislature of Victoria, not repeating the definition of waste land, which words should therefore, I think, be taken according to that in 5 and 6 *Vic.*, and to include all lands not then effectually granted, or contracted to be granted, dedicated, and set apart. The including royalties, mines, and minerals, tend to shew that everything which had not been conveyed from the Crown should pass to the colonial Legislature. Passing to the "*Land Act*" of 1862, its sixth section provided that where Crown lands were promised and set apart for public purposes, if possession had been given, or if trustees had been appointed, or if a written promise to grant the same had been given by the Govern-

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 —
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ment, and if such promise should be established to the satisfaction of the Board of Land and Works, and the fulfilment thereof be claimed within twelve months, "the Governor may convey such land for the purpose aforesaid." In the *Corporation of Melbourne v. The Queen*, which very closely resembles this case, the Corporation relied upon this section as giving them a right to the fulfilment of a promise made by the Governor in 1858, though not otherwise enforceable. I held that the condition of claiming fulfilment within a year extended to lands in possession of a trustee. I also intimated an opinion that in the words "the Governor may convey such land for the purposes aforesaid," the word "may" left it to the Governor's discretion. The full Court, in its judgment on appeal, appears to differ from me as to the necessity of claiming within a year; but appears to concur with me as to the word "may," saying: "The Act 25 Vic., 145, is merely an enabling enactment, it does not make a statutable contract; it authorises a contract valid in law being carried out." As to limiting the section to a contract valid in law, the full Court was more rigid than I was. But that case I take as decisive against the present petition as to seeking relief under that section; but it seems to me not distinguishable from the present upon the main ground upon which it was decided by the full Court. Land had been there, according to the view of the full Court, fully promised to the Corporation for a market; it had taken possession—laid out money for the purposes of a market. The Court distinguished between "a promise by the owner of a piece of land to give it to another in consideration of his doing a certain act, and a promise by the same owner to give the same piece in trust to another for a particular purpose, although that purpose might be to do the very act which he had offered the land absolutely to the other in consideration of his performing," and held that the act being done in the former case does, and in the latter case does not, entitle the actor to enforce the

promise. This decision seems to me to conclude the present case as to all the two acres, the trustees standing in the same position as the Corporation in that case.

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Only because they have rights against the Crown, can the Petitioners succeed against its servants, the Board of Land and Works; and cannot get an injunction without specific performance, by omitting a prayer for the latter. As to the argument of the Crown being bound by acquiescence in expenditure, I have had much commented upon, the case of *Ramsden v. Dyson*. In it the proprietor of land in a town had habitually given tenants possession of land for building purposes without leases as mere tenants at will, discouraged the tenants from taking leases, recognised transmission of tenant interest to new tenants, relying merely on entries in his agent's books—had talked of his tenants having a tenant-right tenure, and relying upon his honour; and this system had been long pursued. It was held that a tenant who had made large expenditure upon the faith of it, was not entitled to protection from an ejectment. The only noble and learned lord who supported the tenant was Lord *Kingsdown*, who held that if a man under a verbal agreement with the landlord for a certain interest in land, or under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation. Now, no one here ever represented the Crown so that his actions and doings could place it in the position of the landlord there. As to the lands appropriated to a church and manse, the Petitioners here have made no outlay except that derived from the land itself, but have made a large profit of it.

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 —
Judgment.

I held in the *Corporation of Melbourne v. The Queen*, that the Petitioners, if otherwise entitled, could not recover under No. 241, because their claim or demand against Her Majesty on contract, had not arisen or accrued since the 4th day of June, 1858. The full Court appears to have differed from me. The report gives their reasons so shortly that I do not quite apprehend them. It is unnecessary for me to consider if the Board of Land and Works are proper parties Defendants.

It is hardly necessary for me to say that in dealing with these cases I have to decide only upon the legal rights of those contending with the Government, yet on questions of costs I might be inclined not to impose them upon persons treated harshly or unfairly. As to the costs of the present suit it involves a question decided by the full Court against the petitioners in *The Corporation of Melbourne v. The Queen*. The petition and bill does not disclose the fact that the original letter of May 29, 1852, distinguished three parcels of ground to be held for three distinct objects, with the view, it would appear, of using evidence of expenditure upon one parcel to support a title to all three. It further represented that the Government only had made the division. If the Board were about selling the school lands, I should regard their proceeding to be so harsh and unfair that I would not probably charge the Petitioners with costs; but it is proceeding to sell only the land appropriated to a manse and part of that appropriated to a church. The Board's advertisement of sale was framed with reference to a plan having allotments numbered differently from those referred to in the letter 29th May, 1852, and might have made the Petitioners suppose it intended to sell the school land; but if such a mistake existed, it was fully removed by the answer. On the whole, I dismiss the petition and bill with costs.

THE ATTORNEY-GENERAL v. THE MAYOR,
COUNCILLORS, AND BURGESSES OF ST. KILDA.

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June 25, 26.

INFORMATION by the Attorney-General of the Colony of Victoria, at the relation of *George Rolfe*, a ratepayer of the borough, against the Mayor, Councillors, and Burgesses of the Borough of St. Kilda, and *Henry Tullett*, *B. F. Bunney*, *S. P. Lord*, *Charles Gray*, *W. G. Murray*, *W. C. Biddle*, *John Oldham*, *Florence Gardiner*, and *T. J. Crouch*, the existing councillors of the borough.

Where prospective contracts, involving outlay in future years, are proposed by a Municipal Corporation, the necessary funds should be provided by means of a special rate; otherwise, the outlay of the year should not go beyond the income of the year.

Where the Council of a Borough proposed to enter into a contract, by which it appeared that they must be either incurring a prospective liability, and that not by means of a special rate, or running themselves into debt as for the current year, injunction granted restraining them from entering into such contract.

Quære, how far a Borough Council is concluded by an estimate made under the Act No. 184, sec. 186.

The Information by its allegations made the following case:—Some time since the Borough Council of St. Kilda erected a town-hall in the borough. Before the rate was struck for the present year an estimate of expenditure for the year was made, and the whole of the estimated receipts for the year, amounting to £9,111 15s., were thereby appropriated to the annual expenses of the borough and certain specified public works, a rate being levied on the footing of this estimate. After this estimate had been made and approved, a proposal was made that a sum of £10,000 should be borrowed, of which sum £4,350 should be spent in making alterations in and additions to the town-hall; and in April the Council advertised for designs for the alterations, offering a premium of £100. Much difference of opinion prevailed, and the Council invited the opinion of the burgesses on the project. A poll was taken, and a majority of fifty-three burgesses was found to disapprove of the proposed expenditure upon the town-hall. On the 31st May the result of this poll was reported to the Council; but the majority of the Council, nevertheless, decided to carry their scheme into effect. On the 10th of June a design was accepted, and tenders for the work ordered to be called for, and sent in on the 21st June. There was a sum of £3,000 of the borough funds in hand, not having been expended on

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the works included in the estimate of expenditure for the year. The Information then set forth that by the 180th section of the "*Municipal Corporations Act 1868*," No. 184, it was provided that the borough fund was to be applied by the Council in the manner therein mentioned; and submitted that the Defendants were trustees of the fund for the purposes mentioned in the Act, and for no other purpose whatsoever; but a majority of the Council—consisting of the Defendants *Tullett, Bunny, Lord, Gray, Murray, and Biddle*—had determined to appropriate this money for the proposed additions to the town-hall, and so far as the same would not be sufficient, intended to pay for the same out of the income of the next year, and to borrow money or pledge the credit of the borough for that purpose: that a large majority of the burgesses were opposed to the intended expenditure, but the majority of the Council (three of whom would vacate office in August next) threatened, and intended, unless prevented by the injunction of the Court, to commence the alterations immediately on the contract being accepted: that the proposed alterations and additions would necessitate the removal of the present roof of the town-hall, and involve considerable risk and danger to the present structure, and it was exceedingly doubtful whether the same could be practically carried out: that pending the proposed alterations the present buildings would be rendered unfit for use, and the Defendants had no funds legally available for the completion of the alterations, and it was probable the same might never be completed. The Information prayed that it might be declared that the intended contract was unauthorised by the provisions of the Municipal Act and beyond the powers of the Council, and that any expenditure of the borough fund on the intended contract would be illegal; that the Defendants might be restrained from entering into the contract or expending any of the borough funds on it, and from pulling down any portion of the existing town-hall or otherwise damaging the same; and

that they might be declared personally responsible for any damage or loss which might result from any attempt to carry on the contract.

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The suit now came before the Court upon a motion for an injunction in terms of the prayer. The Information was echoed and verified, by the affidavit of the Defendant *Crouch*. In opposition to the motion affidavits by the mayor, the borough surveyor, and others were filed, stating that the present town-hall and offices were inconvenient and insufficient for the requirements of the borough; that frequent complaints of the inadequacy of the accommodation had been made for some years past; and that the proposed alterations, which included the provision of a public library, would not involve any risk or danger to the existing structure. The affidavit of the mayor also stated that, in consequence of certain works proposed in the estimate passed by the council not having been able to be proceeded with, there would be an estimated surplus of £2,500 to the credit of the Council at the end of the municipal year, and that there were arrears of rates due amounting to £1,900 not included in the estimate, which sums were greatly in excess of what would be required within the present year for the proposed alterations and additions; also, that it was not the fact that a large majority of the burgesses were opposed to the proposed expenditure for municipal buildings, the fact being that the only difference of opinion was as to the site upon which such expenditure should be incurred.

Mr. *J. W. Stephen* and Mr. *Holroyd* for the Attorney-General in support of the motion.—The proposed contract is altogether illegal, and this Court will restrain a Corporation from entering into an illegal contract. By the Act No. 184, sec. 186, an estimate of the proposed expenditure must be made and approved by the Council, and by that the Council are bound. This was recognised by the full

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Court in *Newman v. The Mayor of Maryborough* (n), and even unforeseen contingencies would not warrant a departure from the estimate. The proposed alterations in the town-hall cannot, however, even be regarded as unforeseen contingencies, for the answering affidavits state that complaints of the want of accommodation have been made for some years. Under colour of erecting more commodious premises, the Defendants propose to render the present edifice altogether useless by removing the roof, and this the Court will restrain. The Defendants, in order to carry out the proposed alterations must either borrow money or run the corporation into debt, either of which this Court will restrain. *Attorney-General v. Daniel* (o); *Attorney-General v. Eastlake* (p); *Ware v. Regent's Canal Company* (q).

Mr. Miller for the Defendants *Oldham, Gardiner, and Crouch*, who took the same view as the Attorney-General.

Mr. Forster, Mr. Fellows, and Mr. Webb for the Corporation and the Defendants *Tullett, Bunney, Lord, Gray, Murray, and Biddle*.—The intention of the "*Municipal Corporations Act*" was to place the entire control of all matters relating to the borough and of the municipal funds in the hands of the Council for the time being; and this Court will not interfere with the ordinary management of the borough fund. *Attorney-General v. The Corporation of Norwich* (r). The "estimate" provided for by the Act is, as the word implies, only of probable expenditure, and is not absolutely binding. *The Queen v. Reid* (s). By the Act, sec. 143, the Council "may from time to time provide and maintain "fit and convenient public offices within the borough." It is sworn here that the present municipal buildings are not "fit and convenient," and a duty is by the Act cast upon the Council to provide others. By sec. 364 the

(n) *Ante*, Vol. IV., Law, 158. (q) 5 Jur., N.S., 25.
 (o) 9 L. J., N.S., 374; 4 Jur., 406. (r) 1 Keen, 700, & 2 M. & Cr., 793.
 (p) 11 Hare, 205. (s) 13 Q. B., 535.

Council may provide a public library, and part of the proposed expenditure is for this purpose. By sec. 180 all the corporate revenue is to be applied by the Council in doing things which the Council by the Act is empowered to do. The Council is, therefore, empowered to expend this money in the way proposed, and this Court will not interfere with its discretion in the application of the money. Nor will this Court consider whether the action of the Council, who have been duly elected by the burgesses, is in accordance with the intentions of the burgesses or not. That is a matter which must be dealt with at the next election of councillors. [*Molesworth, J.*—The opinion of the ratepayers in the matter has nothing to do with the case.] The injunction asked for is to restrain the Council from entering into a contract; but by sec. 147 the Council may enter into any contracts for the execution of works authorised by the Act, and this is such a work. The affidavits shew that there will be funds enough to defray the expenditure incurred for this work during the current year, and it will, therefore, be unnecessary either to borrow or pledge the credit of the corporation.

Mr. J. W. Stephen in reply.

MR. JUSTICE MOLESWORTH :—

I feel a great deal of difficulty about this case; but as it is one that must be disposed of in some way quickly, I will act according to my present lights. The view which I take is such, that with further materials I may be brought to alter. Generally speaking, the borough Councils under the Act have general powers to enter into contracts, and there appears to be no doubt that if they do enter into contracts they are effectual and binding. In their discretion is deposited the interest of the ratepayers as to what the public outlay shall be; and if we read other clauses of the Act, there would, generally speaking, be no limitation to their

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exercise of those powers of discretion, except in two respects. The whole policy of the Act indicates, that where prospective contracts involving outlay not only in the current year but in future years are proposed, they shall be provided for specially by the machinery of special rates, and that otherwise each year, as far as it goes, shall pay for itself. There appears also to be, according to its general policy and by special indications in this Act, a kind of prohibition against the Council running themselves into debt, or in their outlay of the year going beyond the income of the year. These two points, I think, are pretty clearly indicated in the Act, independent of the express provisions of the 186th clause, which points more directly to the estimates of ways and means which they are to provide before fixing a rate. On both these points, considering the magnitude of the sum involved, as contrasted with the ways and means of the Corporation, it appears to me, so far as the figures go, that the Council must be about doing one or other of two things—either entering into prospective liabilities beyond the current year (and that not by means of a special rate), or running themselves into debt as for the current year, and in that respect I think they ought to be restrained.

As to the estimate under the 186th section, I am not at all disposed to adopt the argument to the extent to which it has been urged on behalf of the Plaintiff—viz., that the plan of the proposed expenditure ought to be regarded as an appropriation, and that it creates a sort of trust which ought to be carried out. There are matters, the propriety of carrying out which must vary from day to day; new exigencies may arise which may render the expenditure proposed at one time less important at another. I think the Council has a right to abstain from a proposed expenditure. But I very much question their right to revoke the proposals at one time held out, in order to substitute some altogether different expenditure; at all events on

the scale now proposed. I think they would have a right now to publish a new estimate, discarding the various proposals of their former estimate, and introducing this expenditure into it instead; but I do not think they have a right to do it without publishing a new estimate, and challenging public opinion, and the different means which might be resorted to, to prevent them carrying out an improper purpose.

The ground I am now proceeding upon is this—that, considering the magnitude of the sums, and dealing with the figures so far as I have them before me, the council are about doing an act which they can only do either by incurring a prospective liability or going beyond the ways and means of the current year and running themselves into debt, neither of which things they have a right to do. Dealing with the case simply on this ground, I think they ought to be restrained from proceeding as proposed. I shall grant the injunction until further order. Perhaps with further materials, the ways and means of the matter may be put in such a light, as may induce me to alter my opinion. The costs of this motion will be costs in the cause.

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GREEN v. NICHOLSON.

June 16, 18.
July 6.

EDWARD BERNARD GREEN of St. Kilda, near Melbourne, by his Will, dated 5th August, 1859, devised and bequeathed all his property, except such part as might

A testator left his Australian property to three trustees resident in Australia, and

his English property to three trustees resident in England, and directed that each set of trustees should be entitled to a commission named. The Will contained a power of appointing new trustees, with liberty to alter the number. An Australian trustee having died, two of the English trustees were appointed in his stead.

Held, that the appointment was valid; and that the trustees resident in England, were entitled from the date of their appointment, to their proportion of commission chargeable in respect of the Australian property.

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be in any part of the United Kingdom of Great Britain and Ireland, to three residents in Australia, designated throughout the Will as his Australian trustees, and all his property in any part of the United Kingdom, to three residents in England, designated throughout the Will as his English trustees, upon trust for sale and conversion, with power to postpone sale, demise, and manage, and to invest and apply income as by the Will directed. He declared that if his Australian trustees, or English trustees, or any of them, should die, or decline, or become incapable to act as trustees or trustee of his Will, it should be lawful for his widow by deed to appoint any person or persons to be trustee or trustees in the place of such trustee or trustees, and on any such appointment to augment or diminish the number of trustees, and that by force of every such appointment the powers, authorities, discretions, rights, and duties, given to the trustee or trustees dying, declining, or becoming incapable to act as aforesaid, should be conferred on, and vest in, such appointed trustee or trustees, in whom, either alone or jointly, with the surviving or continuing trustee or trustees, the trust property in respect of which such trustee or trustees should be so appointed, should immediately thereupon be by all proper assurances vested. The Will afterwards directed that the Australian trustees should be entitled to deduct and retain for their own respective use and benefit, to be divided between them in equal shares when more than one, a commission or allowance for their trouble after the rate of five per cent. upon all the annual income of his said trust estate of which they should be such trustees as aforesaid. By a codicil the testator declared that his English trustees should be entitled to the like commission in respect of all annual income which should come to or pass through their hands.

The testator died on the 6th October, 1861, leaving property of great value in Australia and in England. The

Will was proved in Victoria and in England. One of the English trustees disclaimed, and *Palmer*, resident in England, was appointed in his place. One of the Australian trustees died, and the testator's widow by deed of the 5th of January, 1866, appointed *Spence*, one of the original English trustees, and *Palmer* (both described in the deed as resident in England) trustees of the Will in the place and stead of the deceased Australian trustee as to the estate of the testator devised and bequeathed to the Australian trustees. A suit, to which *Spence* and *Palmer* were parties Plaintiffs, was instituted in this Court for the administration of the trusts of the Will in Australia, and the decree, in addition to the ordinary directions, directed the Master to enquire what commission was payable under the Will to the Australian trustees. The Master by his general report, dated 26th February, 1869, after stating the amount of commission found due to the Australian trustees to be £4,406 8s. 4d. in the whole, reported specially that a claim had been brought in before him on behalf of *Spence* and *Palmer* to the sum of £902 4s. 9d., which they alleged themselves entitled to receive out of the said commission by virtue of the deed of 5th January, 1866, whereby the widow, professing to act in exercise of the powers conferred upon her by the Will of the testator, purported to appoint *Spence* and *Palmer* trustees of the Will in the place of the deceased trustee, to act with the other Australian trustees.

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The report was not excepted to, and the suit came on to be heard on further directions.

Mr. *De Verdon* appeared for *Spence* and *Palmer* in support of their claim for commission, and as to his right to be heard cited *Adams v. Claxton* (i).

Argument.

MR. JUSTICE MOLESWORTH considered the application irregular, as it was sought to vary the report without having excepted to it

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Mr. *De Verdon*. The question is raised less expensively at the present stage of the suit, than if it had been made the subject of an independent proceeding, the cost of which would have fallen upon the estate. The Australian trustees are represented and do not object to the determination of the question, which is one merely between the trustees, and does not affect the estate.

Mr. *Bunny* for the Australian trustees, and Mr. *Holroyd* for the Plaintiffs offering no objection, his Honor consented to entertain the application.

Mr. *Bunny* for the Australian trustees other than *Spence* and *Palmer*. The appointment of *Spence* and *Palmer* was unauthorised, as they were both English trustees, and both resident out of the colony. If one of the Australian trustees originally appointed had left the colony to reside in England, he would have become incapable of acting, and might have been removed. *Knox v. Postlethwaite* (v). The appointment of a new trustee who is subject to a disqualification which would have justified the removal of an original trustee cannot be valid. The scheme of the Will contemplates distinct sets of trustees, who are to deal with and be a check upon one another. The testator's intentions are frustrated, if the same trustees are appointed to act in the Australian as in the English trusts. Unless *Spence* and *Palmer* are properly appointed under the power in the Will, they can have no claim to commission.

Mr. *De Verdon*. The Will is carefully drawn and contains no prohibition of such an appointment as has been made. The English trustees are not disqualified as such, from being appointed Australian trustees. In *Knox v. Postlethwaite* the trustee was removed, not because he was resident abroad, but because he would not act. There is no authority for holding absence abroad *per se* an

(v) *Ante*, Vol. I., Eq., 62.

incapacity to act, although where a trustee resident in the country when appointed, subsequently leaves it, his continued absence may render him in fact incapable of acting. It is not a question of law but of fact, and the trustees appointed have acted in this case. *O'Reilly v. Alderson* (w); *Whittington v. Whittington* (x); *Re Wutt's Settlement* (y); *Lewin on Trusts*, 5th edit., p. 467. A trustee resident abroad at the time when he is appointed may execute the trust by attorney, as consent to such a mode of acting is then inferred. *Stuart v. Norton* (z). If the appointment is valid, the right to share in commission is clear.

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Mr. *Holroyd* for the Plaintiffs took no part in the argument.

Mr. *Bunny* in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH:—

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—
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The only question debated before me was the right of some of the trustees to commission under the testator's Will. The testator appointed Australian and British trustees to manage separate funds and estates, and allowed them a commission of five per cent. on sums passing through their hands. He evidently intended that the Australian and British trustees should be different people, and that the property in each country should be managed by persons resident on the spot. His wife, however, had the power to appoint new trustees, and she exercised it by appointing as Australian trustees two of the persons who by her husband's Will were British trustees, and who resided in England. The question is, if this was beyond her powers. It was contrary to her husband's intentions,

(w) 8 Hare, 101.
(z) 16 Sim., 104.

(y) 9 Hare, 106.
(z) 9 W. R., 320.

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who, if he had foreseen that the exercise of the power would be to appoint persons at a distance from the trust, would very probably have provided against it. However, the Court has now only to consider the powers given by the Will, and its language imposes no restriction as to the persons to be nominated trustees. Although, therefore, opposed probably to the views of the testator, I think the exercise of the power legal, and that the trustees were legally appointed, and entitled to share the commission with the Australian trustees. I shall, therefore, declare *Spence* and *Palmer* entitled from the date of their appointment to their proportion of the commission chargeable upon the income received by the Australian trustees, and direct the calculation of commission to be readjusted accordingly. No costs of the application by *Spence* and *Palmer* to be allowed out of the estate.

JENNINGS v. TIVEY.

June 22, 23.
 July 8.

On the dissolution of a partnership between *J.* and *T.*, amongst other terms of arrangement, *J.* promised *T.* that he would not again start in the same business in the same place, but refused to sign

THE Plaintiff and Defendant were partners carrying on business as storekeepers at Inglewood, in premises built upon land allotments 7 and 6A of section 13, Inglewood, held by them as tenants in common. During the partnership they purchased four allotments of land—viz., allotments 12 and 13 of section 6, and 10 and 10A of section 13, Inglewood. In September, 1865, they agreed to dissolve partnership, the Defendant to retain the business premises, stock, book debts and good-will, and allotments 12 and 13, and the Plaintiff to retain allotments 10 and 10A, and also any writing to that effect.

Held, that *J.* had only bound himself by honor, and that *T.* could not protect himself from carrying out the other terms of the agreement for dissolution, by shewing that *J.* had not carried out his honorary engagement.

A Defendant denying an agreement stated in the bill, may rely on the Statute of Frauds without pleading it.

A Plaintiff alleging in his bill an agreement, and acts of part performance, need not state in terms that he relies upon them as such.

to be paid £1,500 by the Defendant. On the 4th October, 1865, a written agreement was entered into between the Plaintiff and Defendant, whereby the Defendant agreed to purchase and the Plaintiff to sell his absolute interest in allotments 7 and 6A and in the stock-in-trade and book debts of the firm, on condition that the Defendant paid to the Plaintiff £1,500—viz., £500 on the completion of the conveyance of the Plaintiff's interest in allotments 7 and 6A and the signing of a dissolution of partnership, and the balance by certain acceptances specified. This agreement made no mention of the allotments 10, 10A, 12, or 13. The Defendant paid the Plaintiff £1,500, and handed over to him the title-deeds to the allotments 10 and 10A, and the Plaintiff subsequently executed conveyances to the Defendant of his undivided moiety in allotments 7 and 6A and 12 and 13; and each entered into possession of the respective allotments, according to the agreement. The Plaintiff subsequently erected a store upon allotments 10 and 10A, and applied to the Defendant for a conveyance of his undivided moiety in these allotments. The Defendant, however, refused to execute a conveyance to the Plaintiff of his undivided moiety, alleging that the Plaintiff had agreed not himself to commence business at Inglewood, and had violated that agreement; and also that the agreement between them was that allotments 10 and 10A should be sold, and that the Plaintiff should receive the purchase money only. The present suit was accordingly instituted by the Plaintiff for the purpose of procuring a conveyance from the Defendant of his undivided moiety in allotments 10 and 10A. At the taking of evidence, it was objected for the Defendant that, the agreement for dissolution having been reduced into writing, no parol evidence of it was admissible; also, that any agreement relative to the allotments 10 and 10A upon which the Plaintiff intended to rely, must be shewn to be in writing within the Statute of Frauds. The evidence was received subject to these objections. The suit now came on for hearing.

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Argument.

Mr. J. W. Stephen and Mr. Webb for the Plaintiff. The written agreement only relates to the premises wherein the partnership business was carried on, and the stock-in-trade and book debts of the firm. No mention is made of the four other allotments of land, and parol evidence is admissible of the agreement to divide these. As to the objection that there is no writing within the Statute of Frauds, that objection is not taken by the answer. But in this case there has been part performance, the Plaintiff having executed the conveyance of allotments 12 and 13 to the Defendant, and each party having entered into possession of the respective allotments under the agreement, and the Plaintiff erected buildings upon 10 and 10A upon the faith of the agreement. *Ridgway v. Wharton* (a). There is no evidence that the Defendant ever bound himself not to carry on business at Inglewood. The evidence only shews that at one time he expressed an intention of not doing so. To be a valid agreement it must be in writing within the Statute of Frauds as not to be performed within a year. There is no evidence whatever of any agreement that the land should be sold by the Plaintiff and not enjoyed in specie.

Mr. Atkins and Mr. Lawes for the Defendant.—Where the agreement is denied by the answer, the Statute of Frauds may be relied on though not pleaded. *Ridgway v. Wharton* (b). It was part of the agreement, on the Plaintiff retiring from the business, that he should not himself commence business in the same place, and this is binding upon him. *Harrison v. Gardner* (c). The agreement not to carry on business need not be in writing, as it is not incapable of performance within the year. *Peter v. Compton* (d).

(a) 3 De G., M. & G., 677; (b) 3 De G., M. & G., 689.
 6 H. L. Cas., 238. (c) 2 Mad., 198.

(d) 1 Sm. L. C., 241.

Mr. J. W. Stephen in reply. The Statute of Frauds does not apply to dealings between partners as to land. *Dale v. Hamilton (c)*.

Cur. adv. vult.

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MR. JUSTICE MOLESWORTH:—

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This suit is brought to establish the right of the Plaintiff to allotments 10 and 10A, at Inglewood, and obtain a conveyance of them from the Defendant. The Plaintiff and Defendant were partners in a store there, equal in profit and loss, but the Defendant had brought in about £1,280 more capital, and there was some agreement that he should have bank interest for it. They purchased the allotments in question, and also allotments 12 and 13, section 6, with funds of the partnership, taking conveyances to them as tenants in common, but not, I think, as partnership property. Each should be treated as having drawn out half the price, and invested in acquiring an undivided moiety in the allotments, to be dealt with as his separate property. About September, 1864, some arrangement was made that the Defendant should take the whole of 12 and 13 as his, and give up his claim for interest on the £1,280; but it seems to have been loosely done, with no precise terms as to the length of time for which interest should be given up, and there is no evidence as to change in the manner of disposing of the profits of 12 and 13, so that I think the bargain was not legally enforceable; but its validity was assumed in the next dealing I shall notice. At the end of September, 1865, they took stock and an account of their assets, in which were included goods in store, the store itself, cottage, and office where their trade was carried on, horse and cart, book debts, cash in house and bank, gold, &c. (not the four allotments), and calculated their respective

(c) 5 Hare, 369; affd., 2 Ph. 266.

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shares in these assets (making no allowance for interest on excess of capital), as Defendant, £2,708 7s.; Plaintiff, £1,425 17s. 9d. After some negotiation, as to which there is some conflict of evidence, they came to an agreement for dissolution upon the terms, so far as they are both agreed, that Defendant should keep the above assets and the good-will of the business, paying the Plaintiff £1,500, part cash, part bills; that Defendant should keep allotments 12 and 13, and the Plaintiff have 10 and 10A or the value of them. The points upon which they strongly differ as to the true agreement are—the Defendant alleges and the Plaintiff denies that the Plaintiff agreed not to carry on business at Inglewood so as to compete with the Defendant. The Plaintiff alleges that the allotments 10 and 10A were to be absolutely his. The Defendant alleges that the Plaintiff was to sell these allotments, and take their price, but not keep them himself, such arrangement being urged by him from the same motive as the restriction upon carrying on business was sought. They actually entered into a written agreement, prepared by an agent of the Defendant, dated 4th October, 1865, for a dissolution, the terms of which were that the Defendant was to keep the premises where their business was carried on, the stock-in-trade, debts, &c., and pay the Plaintiff £1,500, making no mention of restriction as to carrying on business, or of the four allotments. The Plaintiff then lived, and since has lived, upon part of 10 and 10A, the other part being in the hands of a tenant, who paid him his entire rent ever since: 10 and 10A were worth about £160. The Defendant then handed him the title-deeds of the same premises, which he has kept since. The Defendant has retained the partnership property, and carried on business in the same premises, and got conveyances of the legal estate in them. On the 16th of October, 1865, the Plaintiff executed a conveyance of part of the business premises and 12 and 13, worth about £80, to the Defendant. Plaintiff began business on 10 and 10A, close

to the Defendant, selling goods, some of the same class that Defendant dealt in; and Defendant being annoyed at this, about the end of November, 1865, refused to convey the premises in question to the Plaintiff. The Plaintiff extended himself in business, and commenced building about February, 1866. Notwithstanding a notice from the Defendant cautioning him that the land was not his, he has continued the building and trade, the Defendant taking no step to evict him, and himself not instituting this suit until 25th November, 1868.

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Judgment.

I would have been disposed to say that the written agreement of 4th October, 1865, would at law, and unless it was rectified, in equity, bind both parties as to the price, £1,500, being given for the partnership assets, and that parol evidence could not be received to shew that more was to be given on either side for those considerations; or that Plaintiff was to be restricted from trade, or be entitled to 10 and 10^a, or Defendant be entitled to 12 and 18; but the language of the judgment of the Privy Council, in commenting upon my views in *Rolfe v. Flower* (f), I think, obliges me to hold that arrangements as to restrictions and as to the four allotments would be "an addition to the other terms not inconsistent with them." Still the agreement now sought to be enforced relates, I think, not to partnership property, but the interest of a tenant in common in land, which can be affected only by writing at law; so that I have to consider the rights of the parties in equity, as to which I feel considerable doubt and difficulty.

The bill states the entire agreement according to the Plaintiff's view, in no way referring to the writing; the Defendant denies the agreement as stated by the Plaintiff, sets out the writing, sets out his view of the actual agreement, giving him more than the writing, but does not

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—
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rely on the Statute of Frauds. I think a Defendant denying the actual agreement stated in a bill may rely on the Statute of Frauds without referring to it. The bill states that the Defendant got the partnership assets, got 12 and 13, that the Plaintiff got 10 and 10A and their title-deeds—facts of part performance—not stating in terms that he relies upon them as such, but I think it unnecessary for him to do so.

Thus I come to deal with the case on the evidence. Conversations might easily be misapprehended as to whether the Plaintiff expressed an intention not to carry on business at Inglewood; bound himself not to do so; or bound himself by honour, not legally, not to do so. This may account for the great discrepancy there is in the evidence. I prefer relying upon the version of Mr. *Pratt*, who was employed to prepare, and witnessed, the agreement, and was produced as a witness by the Defendant. He says—"I mentioned that there ought to be a clause inserted binding the Plaintiff not to start in business again. Plaintiff said he would not sign anything to that effect; that he had already promised *Tivey* that he would not start in business; said, 'I have no intention of starting; I want to have things settled, and get away as quick as I can.' Plaintiff said he had already promised, and would assure Defendant that he would not start, but would not be bound in writing. I understood him to object to writing only." This evidence, I think, leaves the Plaintiff in the position of having bound himself by honour, but refused to bind himself by law on the subject. I was referred to *Harrison v. Gardner*, in which arbitrators, settling terms between Defendant going out and Plaintiff continuing partner, had valued the good-will at £500, upon an assumption that Defendant should not carry on trade in the neighbourhood; had doubted if the word good-will sufficiently expressed that meaning; had told both partners that the award was made upon the assump-

tion that the Defendant was to be restrained, to which the Defendant made no objection. That does not meet the present case. The Defendant there knew that the award would be altered if he refused. He never said that the Plaintiff must rely upon his promise and nothing else. The most recent and important case upon honorary engagements which I know is *Ramsden v. Dyson* (g), in which the majority of the noble Lords held that persons relying on honorary engagements of others who refuse to bind themselves have no redress in equity or law. For this reason I think that the present Defendant cannot protect himself from giving the Plaintiff 10 and 10A because the Plaintiff has not carried out his honorary engagement.

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JENNINGS
v.
TIVEY.
—
Judgment.

But I am more embarrassed upon the question, if the Plaintiff has a right to take and keep 10 and 10A, or merely to sell them and keep the proceeds. There is much conflict between Plaintiff and Defendant in evidence, and nothing of evidence by other witnesses to corroborate either on this point; the undisputed facts—the handing over of the title-deeds and continued possession by the Plaintiff—are in his favour. [His Honor read the evidence at length upon this point.] I think it clear that the Plaintiff was to have the value of the allotments; and I think, on the balance of evidence, that the restriction that he was to sell and not use them, if it ever existed, was not maintained on the 16th October, when the Defendant got part of the business premises and the allotments 12 and 13.

On the whole, I think there was an entire agreement for the Plaintiff to get the allotments in question and £1,500, the Defendant the partnership assets and lots 12 and 13; that the Defendant had the written agreement prepared, omitting reference to the four allotments, and

(g) L. R., 1 E., & I., App., 129.

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—
Judgment.

got all the written agreement gave him and 12 and 13; that the Plaintiff's engagement not to carry on trade was at most an honorary one, he having refused to give any other; that the engagement to sell and not use, if it existed, was never distinct enough to be enforced, and was omitted at the completion of the dealing. It would be hard to say how it should be enforced, or how the parties could properly be left to adjust their rights at law. The property is not large enough to be worth an issue. I think, under the circumstances, that the Defendant has got all his part of the consideration; he has allowed the possession and use of the lots and title-deeds to the Plaintiff; and these facts are sufficient part performance to entitle the Plaintiff to a conveyance. I am doubtful, upon the evidence, whether the merits are with the Plaintiff, and evidence may have been obscured by his delay in seeking redress, so that I think I should not give him costs.

"Declare that the contract in bill stated for the conveyance by the Defendant to the Plaintiff of the Defendant's moiety of the allotments 10 and 10A in bill mentioned should be performed, and that the Defendant is a trustee of his estate in said allotments for the Plaintiff; and order that the Defendant do execute a proper conveyance thereof to the Plaintiff, to be prepared at the Plaintiff's expense. Refer it to the Master to settle the same, in case the parties differ. Let the parties abide their own costs. Liberty to apply."

SHAW v. PATTERSON.

1869.

July 26.

BILL by the Official and Trade Assignees of an insolvent against the trustees and *cestuis que trustent* of a voluntary settlement executed by the insolvent about two years before his insolvency. The bill prayed that the settlement might be set aside as fraudulent, and that an action which had been commenced by the trustees of the settlement against the Official Assignee, to recover dividends received by him on certain mining shares which formed part of the settled property, might be restrained. The Plaintiffs now moved for an injunction in terms of the prayer, on an affidavit by the Official Assignee verifying the allegations of the bill as to information and belief. The insolvent made affidavit denying that he had executed the settlement with any intent of defrauding his creditors, or that he was insolvent when he executed it.

A bill was filed to set aside a voluntary settlement as fraudulent, and to restrain an action brought by the trustees of the settlement against the official assignee of the settlor, to recover dividends received by him on shares, part of the settled property. It appearing that the value of the shares was small, in proportion to that of the other settled property, injunction granted.

Mr. *Lawes* for the motion. The application is made to save the estate the costs of unnecessary litigation. The verdict in the action will conclude nothing; but the validity of the settlement will be conclusively determined in the suit. If the Plaintiffs fail in the suit the action can proceed, and interest on the amount recovered will put the trustees in the same position as if the action had proceeded now. [*Molensworth, J.*—What is the value of the shares in proportion to that of the other settled property?] The bill does not state the relative value; but from the character of the other settled property—land, houses, &c.—it appears to bear a very small proportion.

Mr. *T. A'Beckett* for the trustees, *contra*. There is no allegation that the trustees are in insolvent circumstances, or that there will be any loss to the estate if the action proceeds and the settlement be ultimately set aside. The

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—
Argument.

case made by the bill is open as a defence to the action at law, and the trustees may be left to try it. The responsibility and risk rests with them, not with the Assignee; and until the settlement be set aside, they are bound to carry out its trusts. The action was begun before the bill was filed, and there is no precedent for restraining it. Such an action should never be restrained in a doubtful case, and the present case is doubtful upon the affidavits.

Mr. *Laves* in reply.

Judgment.
—

MR. JUSTICE MOLESWORTH.—I feel some difficulty on the point. Apparently no authority can be found to support the application; but having regard to the relatively small value of the settled property which is the subject of the action, I think the most beneficial course for all parties will be to restrain it.

Injunction granted until further order.

A consent decree was subsequently obtained setting aside the settlement.

DIGHT v. MACKAY.

CREDITOR'S suit for the administration of the real and personal estate of *George Edward Mackay* deceased. The deceased, by his Will, dated 22nd May, 1861, after specifically devising various portions of his real estate to different members of his family, devised and bequeathed all the residue of his real and personal estate to trustees for sale and conversion for the benefit of his wife and children. The testator died on the 9th August, 1867, leaving considerable real estate, the principal part of which was mortgaged, and indebted to an amount in the aggregate exceeding the whole value of his property. The bill was filed by a creditor, against the executors and trustees and specific devisees of the testator, two of whom, *John Dight Mackay* and *John Scobie Anderson Mackay*, were adults, the remainder being infants. The Defendant, *J. S. A. Mackay*, by his answer disclaimed.

Mr. *J. W. Stephen* for the Plaintiff, asked for the usual administration decree, with certain special directions; and also that the suit might be dismissed as against *J. S. A. Mackay*, with costs to be paid by the plaintiff and added to his costs.

MR. JUSTICE MOLESWORTH.—I do not think I can properly give *J. S. A. Mackay* his costs. He did not from the first disclaim.

Mr. *Forster* for the Defendants *J. D. Mackay* and *J. S. A. Mackay*. These Defendants are in the position of devisees to whom nothing is coming. They are, however, necessary parties to the suit, and entitled to their costs. *Henderson v. Dodds* (h). [*Molesworth, J.*—I do not see why a person

(h) L. R., 2 Eq., 532.

1868.

March 23.
April 9.

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August 2.

Specific devisees, made Defendants to a creditor's suit, where there is a deficient fund, are not entitled, whether adult or infant, to their costs as between solicitor and client. Their case is not in this respect, parallel to that of an heir-at-law in the case of an intestacy. The Plaintiff, and Defendant's executors and trustees, are, however, entitled to their costs as between solicitor and client.

A Defendant, against whom nothing is sought, should not inflict costs by putting in an answer.

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Argument.

against whom nothing is sought should inflict costs by putting in an answer.] The legal estate in some of the specifically devised properties is vested in these Defendants, and a conveyance may be required from them.

Mr. *Webb* for the executors and trustees.

Mr. *T. A'Beckett* for the infant Defendants.

Mr. *J. W. Stephen* in reply. The costs generally will be reserved. The only question now is as to the disclaiming defendant being now dismissed with costs. In *Khull v. Courtney (j)*, it was held that a defendant having no interest need not answer, and was not entitled to costs.

Our. adv. vult.

April 9.
 —

HIS HONOR made a decree directing accounts, and a sale of the real estate; and ordered payment of *J. S. A. Mackay's* costs out of the proceeds of the estate specifically devised to him.

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 —

The suit now came before the Court on further directions. The Master, by his report, found that he had taxed *J. S. A. Mackay's* costs at £21 17s., but that the estate specifically devised to him had been sold by the mortgagee, and did not realize sufficient to pay the mortgage debt. The personal estate and proceeds of the real estate were insufficient for payment of the debts in full.

Mr. *J. W. Stephen* for the Plaintiff, asked for an order that the costs of all parties might be taxed as between solicitor and client and paid out of the estate, and the residue be distributed ratably between the creditors.

(j) Sup. Ct. Vic., June, 1857.

MR. JUSTICE MOLESWORTH.—I do not think I have ever given nominal devisees of real estate costs as between solicitor and client.

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Mr. *Forster* for the Defendants *J. D. Mackay* and *J. S. A. Mackay*. The rule is well established that where there is a deficient fund, the parties shall have their costs as between solicitor and client. By the decree *J. S. A. Mackay*, who disclaimed, was given his costs out of the property specifically devised to him. That has been sold by the mortgagee, and there is no surplus available to pay his costs. He is, therefore, entitled to have them out of the general estate.

MR. JUSTICE MOLESWORTH.—I have disposed of the question of his costs, and do not intend to vary it. He need not have interfered in the suit. I directed that if there was any overplus of the property devised to him he should have his costs out of it. If he had nothing to defend, he need not have answered.

Mr. *T. A'Beckett* for the infant devisees. These defendants are in the same position as the heir-at-law where there is an intestacy, and are entitled to their costs as between solicitor and client. *Tardrew v. Howell* (k). Being infants they could not disclaim, nor could they leave the suit undefended.

Mr. *Webb* for the Defendants the executors and trustees. These Defendants being executors and trustees, are entitled to their costs as between solicitor and client.

MR. JUSTICE MOLESWORTH.—In this case there are several devises of different portions of the real estate, almost all being mortgaged, some to more than its value, some less; and I do not see why the creditors should have to pay the

Judgment.

(k) 2 Giff., 530.

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 —
Judgment.

costs of devisees who have no interest whatever in the suit. I do not think that the case of a devisee is parallel to that of an heir-at-law. I shall confine the allowance of costs as between solicitor and client to the plaintiff and the defendants the executors and trustees; and give costs as between party and party only, to the other defendants, except *J. S. A. Mackay*. I regard his costs as disposed of at the original hearing.

July 30.
August 9.

CARTER v. MURPHY.

Executors, in the absence of any provision in the Will, claimed a commission out of their testator's estate
 (1) Under an alleged parol agreement with the testator before his death;
 (2) Under an alleged bargain before taking out probate, with several of the persons interested under the Will.

Held, as to
 (1) That such an agreement was within the Statute of Frauds, and must be in writing; and if not mentioned in the Will, would be contrary to the Wills Act, and inoperative; and as to
 (2) That such bargains should be discountenanced, as contrary to public policy. But, nevertheless, such a bargain is a ground why remuneration should be given under 15 Vic., No. 10. sec. 16; and commission allowed accordingly.

SUIT on behalf of infant residuary legatees to administer the trusts of the Will of *Patrick O'Dea* under the direction of the Court. The suit now came before the Court for hearing on further directions. The only point upon which it is deemed necessary to report the case is as to the allowance of commission to the trustees.

The answer of *Murphy* and *Lynch*, the executors and trustees, averred that the testator in his lifetime requested the Defendant *Murphy* to become a trustee and executor of his Will, which he reluctantly consented to do, upon the testator's oral promise to have a proper Will made and appoint only one other executor and trustee, with whom *Murphy* would act, and that the two executors and trustees should be entitled to retain for themselves a commission of two and a half per cent. each upon the amount of the testator's property which should be realised. The answer further stated that both Defendants after the testator's death refused to act; but upon a promise by the different

members of the testator's family that the Defendants should be allowed to retain the above-mentioned commission, and also upon the representation that the testator's property would be imperilled unless immediately dealt with, they consented to act, and realised a large sum by their promptitude, and submitted that they were entitled to the commission of two and a half per cent. each before mentioned. The Will contained no legacies to or provision for the remuneration of the executors and trustees. Evidence was given in support of the claim to commission, but having regard to the decision of the Court it is unnecessary to state it at length.

It appeared that the estate would have been subjected to a heavy loss if the executors had not acted, and that they had effected a most advantageous sale of the testator's station and stock.

On 7th December, 1868, a decree was made directing the usual accounts and inquiries as to real and personal estate, and referring it to the Master to inquire and report whether any and what bargains or arrangements were made by the testator in his lifetime, or by any and what persons interested in his estate after his decease, with either and which of the Defendants *James Murphy* and *Michael Lynch*, for the allowance to them of any, and if so what, percentage or other compensation for their trouble and risk in acting as executors, or otherwise carrying out the trusts of the testator's Will and codicils, the direction of such inquiries to be without prejudice to the rights of all parties.

The Master's report in pursuance of the decree certified that a bargain or arrangement was made by the testator in his lifetime with the Defendant *James Murphy* that the executors and trustees of the testator's Will should be allowed a commission of five per cent. on the *corpus* of his

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estate on the sale of the testator's property and on the income after; and that a bargain or arrangement was, after the testator's death and prior to the application for probate of his Will, made by *Matthew O'Dea* since deceased and by the Defendants *Patrick O'Dea* and *Thomas Seward*, that the executors and trustees should be allowed a commission of five per cent. as an inducement to them to prove and take upon themselves the execution of the trusts of the Will and codicils, and that *W. M. Carter*, the father of the infant Plaintiffs, at one time assented to this arrangement, but afterwards refused his consent.

The Master's report was confirmed without exception; and the cause now came on to be heard on further directions.

Argument.
 —

Dr. *Mackay* and Mr. *Webb* for the Plaintiffs submitted to the Court the question of the allowance of commission to the executors and trustees, and cited *In re Hawkins* (1).

Mr. *Cock* for the Defendant *John O'Dea*, and Mr. *Forster* for the Defendants *Seward* and wife, did not oppose the granting of the commission.

Mr. *Billing* for the Defendant *Patrick O'Dea*. The terms of the agreement proposed to the testator not having been adopted by his Will, the proposal came to nothing, and no binding agreement after his death has been proved.

Mr. *Lawes* for the infant Defendants *O'Deas*, and Mr. *T. A'Beckett* for the infant Defendants *Sewards*. The alleged agreement with the testator cannot be recognised without violating the Wills Statute, as it was a contract in the nature of a testamentary disposition affecting assets specifically, and not to take effect except in the case of death. The contract made after the testator's death as

(1) *Ante*, Vol. III., I.E.M., 73.

found by the Master's report was so vague as to amount to nothing, and could at most only bind the parties entering into it, not the infants affected to be represented. The commission if allowed at all can only be allowed on the personal estate on the principle acted on in *Chadwick v. Bennett* (m).

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Mr. Bunny and Mr. De Verdon (Mr. J. W. Stephen with them) for the Defendants *Murphy* and *Lynch*. The Master's report, which has not been excepted to, and which binds all parties to the suit, finds a distinct contract with the testator to allow his trustees the commission mentioned in the report, and which is now claimed, not as a matter of favour under a discretionary power in the Court, but as matter of right. The trustees have given valuable consideration, by managing the estate in reliance upon the promise made to them. The agreement subsequent to the testator's death is relied upon, not as a new contract, but as confirmatory of that entered into by the testator. The trustees' management has been most beneficial. The contract to give the commission might have been performed within a year from the making of it, if the testator had died within the year, and was, therefore, not required to be in writing by the Statute of Frauds. An agreement to leave a legacy, though not in writing, has been recognised and enforced. *Fenton v. Emblers* (n).

Cur. adv. vult.

MR. JUSTICE MOLESWORTH:—

August 9.
Judgment.

The principal question debated before me was the right of the trustees *Murphy* and *Lynch* to be allowed a commission of five per cent. on the *corpus* of the estate and the residue. The trustees claimed the commission under

(m) Sup. Ct. Vic., 21 Feb., 1868, *Ante*, Vol. V., Eq.

(n) 3 Bur., 1278.

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 —
Judgment.

an alleged agreement with the testator before his death; but it was not provided for in the Will. It has been said that this does not fall within the Statute of Frauds, because it might be performed within a year; but at the earliest the executors' duties could not close before a year from the testator's death, and therefore necessarily more than a year from the alleged agreement. Again, it is said that it is not within the words of the Statute of Frauds, which are that "no action shall be brought," and here the executors might pay themselves without action. But if so, it would still be a contract relating to land, as the alleged contract embraces both realty and personalty, and therefore necessarily in writing under the statute. But I think the best way of considering it is by comparing it to a promise to leave a person a legacy conditional upon the legatee doing some service that the legatee was ready to perform. Such an arrangement, if it were not mentioned in the Will, would be quite contrary to the policy and the letter of the Wills Act. And similarly the arrangement said to have been made in this case was inoperative.

It was then alleged that a bargain was made by the executors, before applying for probate of the Will, with several of those interested under the Will, that they should receive a commission of five per cent. Bargains of this kind with executors, stipulating for remuneration before they will take out probate, have been held in England as to be discountenanced as contrary to public policy. *Gould v. Fleetwood* (o), *Ayliff v. Murray* (p). So that in England I think that bargains of the kind proved here would not be sustained.

However, although thus conceding that the trustees have no right either as to a bargain with the testator or with the family before taking probate, I think that the existence of those bargains is a ground why I should con-

(o) 3 P. Wms., 251.

(p) 2 Atk., 58.

sider that some remuneration should be given them by the Court, acting in its discretion, under the 15th Vic., No. 10, sec. 16; and I would allow as to past services two and a half per cent. on the *corpus* of the personalty, and treat that as chargeable on the residue, and for the future the same commission as is allowed to receivers—namely, five per cent.

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v.
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—
Judgment.

The decree made by His Honour was (*inter alia*):—

"Direct that the said *James Murphy* and *Michael Lynch* be allowed "and have liberty to retain a commission at the rate of two and a half "per cent. upon the *corpus* of all the personal estate of the testator "which came to their hands, for their pains and trouble as executors and "trustees of the said Will. Declare that the said *James Murphy* and "*Michael Lynch* may retain commission at the rate of five per cent. upon "money hereafter coming to their hands, and the income of funds which "heretofore came to their hands as such trustees, as if they were "appointed receivers of this Court."

Decree.
—

IN THE MATTER OF THE WILL OF ISAAC FOLK.

PETITION by the executors and trustees of the Will of *Isaac Folk* to obtain the opinion of the Court, under section 61 of the "*Statute of Trusts 1866*."

August 2, 12.

A testator's property, consisting of freehold houses, producing a yearly rental of about £150, and about £5,000 personalty, was vested in

The testator devised and bequeathed all his real and personal estate to the Petitioners, after payment of his

trustees, as to the houses, for the widow in trust "to pay her the rents." Bequests were made as follows:—To the widow, "the annual income to be derived from the sum of £2,000 debentures," and "to invest £300 in debentures, and to pay the annual income" to testator's brother. The testator's only child was entitled to the residue. On case stated by the trustees, for the opinion of the Court,

Held, that the rents to be paid to the widow were the net rents, after deduction of the expense of keeping the property in tenantable repair, but not of insurance, which should be paid out of the *corpus* of the estate.

Held also, that interest on the sums of £2,000 and £300, by the Will directed to be invested, was not payable until after the expiration of a year from the testator's death.

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debts, upon trust during the life of his widow, "to pay her the rents to be received from the following houses" (describing them), and "the annual income to be derived from the sum of £2,000 Victorian Government debentures." He directed the Petitioners to invest £300 in Victorian Government debentures, and to pay the annual income to his brother for life. The residue of his estate was to be invested and accumulated for the benefit of his son until his marriage, and then paid over to him. He declared it to be his will that, while his widow was in receipt of the income left to her (which receipt was terminable on her marriage again), she should maintain and educate his son; and that on her death or ceasing to be entitled to the income given her, the Petitioners should apply the yearly sum of £150 in his maintenance and education. The testator's estate consisted of personalty worth about £5,000, after payment of debts, and of the houses mentioned in the Will, the rents of which did not exceed £150 per annum. The houses were out of repair at the testator's death, and had been repaired by the Petitioners at a cost of about £100. The widow claimed to be entitled to receive the gross rent of the houses, without deduction for repairs, taxes, or insurance, and claimed an allowance for the maintenance of testator's son, who was only a few months old at the testator's death.

The questions submitted to the Court were—Whether the Petitioners were bound or authorised to repair or insure the house property? if so, what kind of repairs should they make, and up to what value insure, and on what portion of the estate should the expenses of repairs and insurance and of collecting the rents fall? Whether the Petitioners were authorised to make any allowance to the widow for the son's maintenance and education? From what dates ought they to pay interest on the sums of £2,000 and £300 Government debentures? and in what manner the costs of this application were to be paid?

Mr. *Holroyd* for the Petitioners, on the question of payment of rates, insurance, and repairs, referred to *Lewin on Trusts*, 5th ed., p. 416; *Bridge v. Brown* (q). The debenture interest ought not to be paid until a year from the testator's death, as the beneficiaries are not annuitants but legatees for life of a sum of money; *Gibson v. Bott* (r).

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Argument.

Mr. *J. W. Stephen* for the widow. The question as to repairs and insurance should be determined in favour of the widow, on the principle that a tenant for life is in equity unimpeachable of permissive waste. *Powys v. Blagrove* (s). As the trustees take the legal estate by importing the machinery of trustees, the testator apparently intended that they should preserve the property out of the general trust estate, otherwise the widow would have been given a legal estate for life. She is, therefore, entitled to gross, not net rents. As to the interest on debentures, the gift is of an annuity, with a direction to invest in a particular way to secure it. The widow is to maintain the infant out of her interest, and the gift of the debentures is virtually a legacy for an infant. Interest on the £2,000 would be payable from the date of the testator's death in either aspect. *Williams on Executors*, 6th ed., p. 1324. The testator has fixed [£150 a year as the sum to be allowed for his son's maintenance, if the widow die or marry again. Her present income will not permit that amount to be applied to the purpose, and an allowance for his maintenance ought, therefore, to be made.

Mr. *Holroyd* in reply.

Our. adv. vult.

MR. JUSTICE MOLESWORTH :—

August 12.
Judgment.

This was an application made by the trustees and executors of the Will of *Isaac Folk* with reference to the
(g) 2 Y. & C.C.C., 181. (r) 7 Ves., 96. (s) 4 De G. M. & G., 448.

1889.
In re
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allowance to be made to the widow of the deceased. By his Will he directed the rents of three houses to be paid to her, and the interest from the investment of £2,000 in Government debentures to be also paid her; and imposed on her the obligation of maintaining their child, an infant now about a year old; and in the event of the marriage or death of the widow, the child was to be allowed £150 per annum for maintenance and education. An argument was based upon the probable amount of the property to induce a more liberal construction of the Will as to the widow's rights, upon an averment that the income coming to the widow under the Will would not amount to the £150 allowed to the child. Now, in the first place, it is not to be supposed that the testator contemplated that the death or marriage of his widow would take place immediately, and the £150 provided for his son was rather prospective than immediate. The provision for the widow certainly seems small, but when people make Wills, it is for executors and trustees to carry them out, and not to substitute for them what might be considered more liberal or more just arrangements. The deceased may have contemplated that the widow had other means of living and of earning money for herself. Therefore, I think the case is to be dealt with under the ordinary rule affecting the relation of tenant for life and remainder man, which certainly imposes upon the tenant for life, and not upon the remainder man, the liabilities accruing from year to year.

I have drawn answers to the questions put, as follows:—
 The trustees are bound to keep the property in tenantable repair, but are not compelled to effect improvements; the expense of such repairs to be deducted from the rents payable to the widow; the rates and expense of collecting to be also charged against the sums payable to her. The trustees may insure the property, the cost to be paid out of the *corpus* of the estate. The trustees are not

authorised to make any allowance for the maintenance and education of the infant *Samuel Mark Folk*. The trustees ought to pay interest on the sums of £2,000 and £300, by the Will directed to be invested at the expiration of a year from testator's death. Costs of the application to be paid out of the *corpus* of the estate.

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THE ATTORNEY-GENERAL v. BENTLEY.

August 26, 28.
September 18.

INFORMATION by the Attorney-General, at the relation of the Corporation of Ballarat East, and bill by that Corporation as Plaintiffs against *Simon James Bentley* and others, members of the New Albion Gold Mining Company (unincorporated), to restrain them from undermining some of the streets of Ballarat East. An *ex parte* injunction was obtained; and the suit being left undefended, a decree was made for a perpetual injunction, with costs.

Defendants arrested under an attachment for contempt should, whenever arrested, be turned over to the custody of the keeper of H.M. gaol in Melbourne.

Five of the Defendants—*Bentley, Irwin, Logan, Rider, and Jones*—were subsequently arrested at Ballarat on an attachment for non-payment of the taxed costs of the suit, amounting to £82 3s., and were now brought before the Court in the custody of the Sheriff of Ballarat.

In an Information by the Attorney-General at the relation of a Municipal Corporation, and Bill by such Corporation, the Court can only hear counsel instructed by the solicitor on the record; and cannot hear counsel instructed by the Attorney-General directly, to

Mr. *Webb*, for the Attorney-General and Plaintiffs, moved that they be turned over to the custody of the Sheriff in Melbourne:

Mr. *Lawes* and Mr. *T. A' Beckett*, for some of the Defendants, took several technical objections to the proceedings which

pursue a course different from that which the relators wish.

Five Defendants were imprisoned for contempt in not paying joint costs. Three were discharged on payment of their proportion of the original costs, and the costs of their contempt.

Held, that such discharge did not release them, or the remaining two, from the balance of costs due; and that the remaining two were only entitled to their discharge on payment of such balance, and the costs of their contempt.

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were over-ruled. The question then arose, whether the Defendants should be "turned over" to the custody of the Sheriff at Ballarat, or at Melbourne.

Mr. Webb. The practice in England is, that a Defendant in custody for contempt is turned over to the custody of the keeper of the Queen's Prison in London, and by analogy these Defendants should be turned over to the custody of the Sheriff in Melbourne. By the *Supreme Court Rules*, cap. vi., r. 41, all the duties discharged by the Serjeant-at-Arms in England are to be discharged here by the Sheriff; and by r. 42, every person arrested is to be dealt with by imprisonment, in like manner as persons are dealt with when brought to the Bar of the Court of Chancery in England by a Serjeant-at-Arms. The practice of this Court has always been to turn over prisoners to the Sheriff in Melbourne. *Evans v. Guthridge* (t). And great inconvenience and expense would result from sending the Defendants to Ballarat, as they might have to be brought up to the Court in Melbourne on any motion for their discharge.

Judgment.
 —

HIS HONOR, after consulting with His Honor the Chief Justice, said that he thought the proper course was to order that the Defendants be turned over to the custody of the keeper of Her Majesty's Gaol in Melbourne.

Order accordingly.

August 28.
 —
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Mr. T. A'Beckett, on behalf of the Defendants *Logan* and *Rider*, now moved for their discharge from custody, as on the consent of the Attorney-General.

Mr. J. W. Stephen, instructed by the Crown Solicitor, appeared for the Attorney-General, to consent to their discharge.

(t) *Ante*, Vol. I., Eq., 49.

Mr. *Webb*, instructed by the solicitor on the record for the Attorney-General and Plaintiffs to oppose the discharge, objected to Mr. *Stephen* being heard, and submitted that no counsel could be heard unless instructed by the solicitor on the record.

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Mr. *J. W. Stephen*. 'The Attorney-General has sole control over the proceedings, and on his behalf I am instructed to say that he consents to the men being discharged. [*Molesworth, J.*—Will the Attorney-General pay the relators, costs?] I am not aware that he will. I am instructed by the Crown Solicitor to appear for the Attorney-General, adversely to the relators. The Attorney-General has absolute control over every information instituted in his name, *Attorney-General v. The Haberdashers' Company (v)*, and may interpose in opposition to the relators. *Attorney-General v. Wyggeston's Hospital (w)*; *Attorney-General v. Sherborne Grammar School (x)*. He has an undoubted right to interpose, and the only question is how practically he is to enforce that right. [*Molesworth, J.*—The proper way of proceeding would be to apply to substitute another solicitor on the record.] He wishes at once to interpose and secure the release of these Defendants, who have been arrested, certainly without his direct authority, and as he considers without his implied authority.

MR. JUSTICE MOLESWORTH —I cannot entertain the application in this aspect. The Attorney-General and relators have joined in proceedings. They appear by a solicitor on the record, and the only person I can deal with is the solicitor on the record, and counsel instructed by him. I cannot in this application try a question as to who properly represents the Attorney-General and Plaintiffs, or hear a counsel not instructed by the solicitor on the record to say that he is instructed by the Attorney-General to pursue a

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(v) 15 Beav., 397.

(w) 16 Beav., 313.

(x) 18 Beav., 256.

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 ———
Judgment.

course different from that which the relators wish to pursue. As between the applicant and the relators appearing by the solicitor on the record, I refuse the application, with costs.

The Defendants, *Bentley, Irwin, and Jones*, subsequently moved for their discharge on payment of £85 each; counsel instructed by the solicitor on the record for the Plaintiffs, appearing and not opposing; and an order was drawn up in each case as follows:—"Upon hearing counsel for the Defendants and counsel for the Plaintiffs, order, that Defendants be discharged from custody on payment of £85 to the Plaintiffs' solicitor." Under this order the three Defendants were discharged. By arrangement between the Defendants and the Plaintiffs' solicitor, not embodied in the orders, which said nothing as to the application of the sums of £85, such sums were applied in payment of each Defendant's proportion of the £82 8s. taxed costs, and the balance was retained towards payment of the additional costs of contempt not yet taxed. The solicitor of the other two Defendants had applied to the Plaintiffs' solicitor to ascertain the exact amount due, and was informed that it could not be ascertained until taxation, but an offer was made, without prejudice, to consent to the Defendants' discharge respectively, on payment by each of £11 1s. 6d., the balance of the original sum of £82, remaining unpaid, without further costs.

September 13. Upon the above facts appearing by affidavit, the two Defendants remaining in custody, now moved for their discharge forthwith, or, failing that, for a reference to the Master to ascertain and tax the costs due by them, and for their discharge on payment thereof.

Argument. Mr. T. A'Beckett for the motion. The Defendants are entitled to their immediate discharge without any pay-

ment; not on the ground that the sums already paid amount to more than the £82 8s., for non-payment of which they were imprisoned, but because three of the five joint and several debtors have been released by a transaction between them and the creditor, carried out by an order of the Court. That release amounts to a discharge of the debt, and the discharge of the debt of one enures to the benefit of all. The operation of such a release at law is undoubted: *Cheetham v. Ward* (y). The discharge of a debtor taken under a *ca. sa.* is a release of the debt, *Goodman v. Case* (z), and the release of one of several joint and several debtors so taken, prevents the taking of any of the other debtors, and would be ground for their release if taken: *Clarke v. Clement* (a), *Allan v. Waldegrave* (b). Although the Defendants are imprisoned nominally for contempt, their imprisonment is only regarded as an equitable execution, and not as a contempt to this Court. If it were otherwise, no act of the parties could waive the contempt, but it is clear that such a contempt may be waived by the act of the party enforcing it: *Dan. Ch. Prac.*, 4th ed., p. 468. If not entitled to their immediate discharge, the Defendants are at least entitled to have the amount due by them ascertained, and to the benefit of contribution which has been made by the co-Defendants who have been released.

Mr. Webb for the Plaintiffs.—The principle of the common law cases is admitted, but it is inapplicable to imprisonment for contempt, which does not, as does a *ca. sa.*, prevent the creditor from enforcing payment of his debt by other means. The debtor is technically imprisoned for the contempt of Court in disobeying its order for payment, and the imprisonment is not considered as satisfaction to the Plaintiffs. The cases at law proceed on the principle that the creditor is satisfied by taking his

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(y) 1 B. & P., 630.

(a) 6 T. R., 525.

(z) 1 B. & Ald., 297.

(b) 2 Moore, 625.

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debtor in execution. The Plaintiffs here are still entitled to recover the balance of the debt due by the Defendants who have been released: *Barnist v. Powell* (c), *Hopkins v. Adcock* (d), *Bedall v. Page* (e), *Knott v. Coitis* (f). As to the other alternative of the motion, the Plaintiffs are entitled to payment of costs occasioned by the contempt in addition to the costs for which the Defendants were originally imprisoned.

Mr. T. A'Beckett in reply.


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 —

MR. JUSTICE MOLESWORTH.—Several persons having been arrested for contempt in not paying costs decreed against them, it is only equitable that each should, upon the Plaintiffs' consent, get out as he pays his share; they should be relieved from the hardship of being all kept till the whole amount is paid. In this way substantial justice is done to all parties. In this case the best means has been adopted of doing it. Each has been allowed to pay his share, and so escape from the rigour of confinement. The difficulty in these cases at law is, in a great measure, the result of a legal principle that a discharge from a *ca. sa.* operates as a release, with which we are not embarrassed in equity, as in equity Defendants are arrested, not for non-payment of the debt, but for contempt of the Court, consisting of their disobedience to an order directing payment; and they are discharged, not because they have paid the debt, but because they have purged their contempt; and they are usually released on terms of indemnifying the opposite party for all costs. The parties in this case were arrested for contempts committed by each individually in not paying the entire sum. Some of them were released on paying a little more than their respective shares, but that release did not discharge them from the debt. The debt still continued, and the other parties were not released from it, nor have

(c) 1 Dick., 130.
 (d) *Ib.*, 443.

(e) 2 Sim., 224.
 (f) 19 Beav., 471.

they purged their contempt. I think, therefore, that the Defendants cannot succeed in their application. At the same time I would not permit the injustice and hardship of Plaintiffs getting a number of persons into custody for a common contempt, and extorting from each more than his share of the costs. It does not appear that anything of that kind has been attempted in this case, but rather the reverse. The Plaintiffs have offered to consent to Defendants being discharged without costs on payment of the balance of the original costs. The Defendants have not accepted these terms, but have come to the Court for their strict rights, and their strict rights ought to be granted to them. I shall direct the Defendants to be discharged on payment of £11 each, balance of the £82, and such costs as they are respectively liable to in respect of their proportion of the costs of contempt, and the costs occasioned by their prior abortive motion for discharge, and the costs of this motion.

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"Refer it to the Master to ascertain and tax the costs to which the Defendants *Logan* and *Rider* are respectively liable for the costs of subpoena for costs, attachment, arrests, and commitment of 28th August, motion for discharge, and of this motion; and upon payment by each of them respectively of £11 1s. 6d. and the costs above mentioned payable by such Defendant, to the Plaintiffs' solicitor or his town agent, let such solicitor or agent sign an order to the Sheriff for the discharge of such Defendant, and let such Defendant be thereupon discharged."

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Feb. 22, 23, 26,

March 15.

April 16.

May 13, 14, 15.

September 2.

HARRISON v. SMITH.

E. deposited with the Bank of Victoria scrip for 550 shares in the

BILL by *Harrison* and others, trustees for the Bank of Victoria, and the Bank as co-Plaintiffs against *Smith*, Golden Gate Gold-Mining Company as security for monies then due by him to the bank. Subsequently *E.* executed a statutory creditors' deed. The company applied for a lease of its claim, and stopped working, by which its claim became liable to forfeiture. *S.*, a previous director, resigned his directorship, and immediately instituted proceedings before a Warden for the forfeiture of the claim. The Warden dismissed the case, and *S.* gave notice of appeal. Pending the appeal, *S.* agreed to withdraw his proceedings in consideration of the bank giving an undertaking to meet the liabilities on *E.*'s shares so long as they held them as security. *E.*'s trustees, by arrangement with the bank, sold *E.*'s shares by auction, which were purchased (11th June) for the bank, in the name of *H.* and others, its nominees. The bank manager (14th June) wrote to the manager of the company, undertaking to see all calls paid. This was first communicated to *S.* on 11th July. *S.* repudiated the bank manager's letter as not binding on the bank, and prosecuted his appeal. On 26th June *S.* wrote, consenting to an amalgamation of the Golden Gate Company with another company, and undertaking, in the event of his appeal being successful, to convey to all the shareholders in the Golden Gate Company, other than *E.*, or those claiming through him, shares equal to those previously held by them. Pending the ultimate decision of the appeal, *S.* wrote to the company's solicitor in effect that he held himself bound by this undertaking if successful on the appeal, not if the company continued to litigate actively with him. The appeal was therefore heard unopposed, and *S.* succeeded. The two companies were then amalgamated, and *S.* distributed the shares according to his letter of 26th June, but excluding the bank, and retaining to himself the shares in the amalgamated company representing *E.*'s 550 shares. On bill by the bank and its nominees, into whose names *E.*'s shares had been transferred, against *S.*,

Held, by the full Court affirming *Molesworth J.*, that the bank and its nominees were properly joined as co-Plaintiffs: but reversing *Molesworth J.*, (1) That the purchase of the shares by the bank under the circumstances, was not a violation of its Act of Incorporation, as investing its funds in a trading or mercantile speculation, not within the ordinary and legitimate purposes and operations of banking establishments: (2) That the undertaking of the 11th June was within the scope of the authority of the bank manager, and did not require the corporate seal: and (3) That the forfeiture and bargain for the amalgamation had been brought about by unfair means as against the bank, and that the Defendant was a trustee for the bank, of the shares in the amalgamated company, representing *E.*'s 550 shares in the Golden Gate Company.

Snider v. Boly, The Act No. 197, sec. 29, makes a press copy evidence without comparison, but does not make it primary evidence except as to dispensing with notice to produce.

An appellate Judge should hear an appeal, without reference to negotiation for compromise after the decision below.

Objections to appeals must be dealt with by the appellate Court; not by the primary Judge.

sole Defendant. The bill alleged that one *Eisenstaedter* deposited 550 shares in the Golden Gate Gold Mining Company with the bank, as security for a debt of his to the bank; and subsequently made a statutory assignment for the benefit of his creditors. That the Defendant, who was one of the four directors of the company, took an active part in its management, and that while he was director, and pending an application for a lease under the "*Mining Statute*," the company's claim was forfeited by non-working. That the Defendant opposed the application for a lease, and took out a summons to enforce the forfeiture, which was dismissed. That after the dismissal, the manager of the company and *Hogarth* (another of its directors) requested the Defendant to abandon his proceeding against the company, which he agreed to do on the terms of the following undertaking, dated 27th May, 1867:—"I hereby undertake to withdraw my application for the possession of the Crown land in the late occupation of the Golden Gate Gold Mining Company, and also to agree to an amalgamation with the A1 Company, in consideration of receiving eighty shares of the amalgamated company, and also in consideration of the Bank of Victoria giving an undertaking to meet the liabilities on Mr. *Eisenstaedter's* shares in the said company so long as the said bank shall hold the said shares as security, and have the right to draw the dividends, if any, therefrom." That *Hogarth* signed a transfer of sixty shares to the Defendant, which were a necessary addition to the number then held by him to give him the interest stipulated for, in the amalgamated company. That shortly afterwards *Matheson* (the manager of the bank), being asked for the undertaking stipulated for by the Defendant, signed the following letter, dated 14th June, 1867, addressed to the manager of the Golden Gate Company:—"Referring to my conversation with you as to the shares in your company standing in the name of *Eisenstaedter*, I beg to inform you that the bank is interested therein as holding them as security against *Eisenstaedter's*

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Notice of
"intention"
to appeal,
without
using the
word
"desire,"
held sufficient
under 19 *Vic.*,
No. 13, sec. 5.

The chief
clerk in the
Master's office
received as a
deposit on an
appeal, a
cheque for
£50,

Held, a
substantial
compliance
with Act
19 *Vic.*,
No. 13, sec. 5,
and that the
clerk took the
cheque at his
own peril of
having to
make good
the money.

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liabilities, and we undertake to see all calls and other expenses thereon duly paid while the said shares remain in their present position.—J. MATHESON, General Manager.” That the A1 Company’s claim was contiguous to that of the Golden Gate Company, and the terms of an amalgamation between the two companies had been agreed upon, some time before the Defendant gave his undertaking. That the bank, relying upon the Defendant’s undertaking, agreed with *Eisenstaedter’s* trustees to take over the shares held as security as part payment of their debt at £2 10s. per share ; and that the shares were accordingly transferred to the individual Plaintiffs in the suit, as nominees of, and trustees for, the bank. That the scrip for the sixty shares, transferred by *Hogarth*, were afterwards forwarded to, and retained by, the Defendant ; but that, notwithstanding his undertaking, he gave notice of appeal from the order dismissing his summons, and at the same time sent to the Golden Gate Company a letter, in which he promised, in the event of his appeal succeeding, to restore to all the shareholders, except the holders of the 550 shares taken over by the bank, the same interests as they then held in the Golden Gate Company. That the appeal was prosecuted in the Court of Mines at Wood’s Point, 31st July, 1867, and two questions were reserved for the opinion of the Chief Judge as follows :—“ Was there such an application for a lease as to protect the land, and to avoid the duty of working ? Was the relation of the Appellant as shareholder and director of a fiduciary character, such as to prevent him from enforcing a forfeiture ?” That the Defendant’s undertaking and other documents were produced at the hearing of the appeal, but were not noticed in the special case, and that their absence was objected to on behalf of the company on the hearing of the special case before the Chief Judge, who, 2nd March, 1868, answered the questions as follows :—“ 1. An application for a lease is no protection from forfeiture ; 2. A person being shareholder and director is

not thereby precluded from enforcing forfeiture;" and on delivering judgment, observed that the Defendant, notwithstanding his legal right, might be accountable in Equity, and that if matters material to the defence had been omitted from the special case, the judge below would probably rehear the case if applied to. That the Defendant was present in Court and heard these observations, and the next day (8th March) wrote a letter to induce the other shareholders to abandon their defence, stating that he still held himself bound to re-convey to the shareholders to whom he had in his previous letter promised to restore their forfeited interests; but that, if they combined to allow the bank, against whom alone he intended to enforce the forfeiture, to litigate with him under the name of the company, he should not return them their interests. That a meeting of shareholders was called to consider this letter, and it was thereat resolved to accept the Defendant's proposition, a protest against the resolution being handed in on behalf of the bank. That the Plaintiffs endeavoured to induce the managing body of the Golden Gate Company to oppose the Defendant in the further prosecution of the appeal, but without success; and that he subsequently obtained unopposed an order authorising him to take possession of the Golden Gate Company's claim. That after the Defendant had taken possession of the claim under the order, he assigned it to the A1 Company, in consideration of a certain number of new shares issued to him by that Company. That the new shares issued to him as the price of the claim were distributed by the Defendant between himself and the other shareholders in the Golden Gate Company, except the Plaintiffs, on the principle of giving to each of them the same proportion of the shares given by the A1 Company as he held in the Golden Gate Company; but the Defendant, on this distribution, treated himself as entitled to the sixty shares in the Golden Gate Company transferred to him by *Hogarth*, and appropriated to himself the shares in the

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—
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A1 Company distributed in respect of the 550 shares taken over by the bank (giving thereby to each shareholder in the Golden Gate Company except the bank his proportion of the shares in the A1 Company which constituted the price paid for the Golden Gate Company's claim, and appropriating to himself the shares in the A1 Company which would have been the proportion of the price receivable by the bank if they were included in the distribution).

The Plaintiffs submitted that under these circumstances they were entitled to the shares in the A1 Company which the Defendant appropriated in respect of their 550 shares in the Golden Gate Company; and prayed a declaration that the Defendant held them as trustee for the Plaintiffs, and that he might be directed to transfer them as the Plaintiffs should direct, and account for dividends and proceeds of sales, if any.

By his answer the Defendant stated that he was never a director of the Golden Gate Company, though he had on one or two occasions acted as such, and that he sent in his resignation before issuing the summons. That his undertaking set out in the bill was given at the request of *Boyd*, the manager of the Bank of Victoria at Wood's Point, who promised to transmit it at once to the head office at Melbourne and procure at once the undertaking required from the bank. That the sixty shares referred to were given by *Hogarth*, not as consideration for withdrawing the appeal, but as consideration for the Defendant consenting to the amalgamation with the A1 Company on terms proposed by *Hogarth*, and were to be returned unless such amalgamation were carried out, and that such amalgamation never was carried out. That the Defendant seeing *Boyd* on his return from Melbourne a few days after the date of the Defendant's undertaking, told him that he (the Defendant) should treat his undertaking as void, as the bank had failed to give the undertaking required from

them. That the Defendant knew nothing of *Matheson's* letter until 13th July, 1867. The Defendant submitted that, as neither the bank nor *Hogarth* performed the undertaking on their part, or expressed an intention to do so within a reasonable time, he was entitled to treat the undertaking as void. He admitted the statements of the bill as to the making over of the claim to the A1 Company and the mode of distributing the shares received by him as consideration for the claim, and also that all the shareholders in the Golden Gate Company except the Plaintiffs had acquiesced in the assignment of the claim to the A1 Company. He submitted that the Plaintiffs could not join in one suit as they were not jointly interested; that the Bank of Victoria had no claim against him, and was, therefore, improperly made a co-Plaintiff; that the bank was incapacitated by its Act of Incorporation from holding shares in any commercial speculation or business; that the bill was bad for multifariousness and misjoinder; and that the A1 Company was a necessary party to the suit.

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At the taking of evidence the original letter from *Matheson* of the 14th June, 1867, was not produced. A press copy was put in and received, subject to the Defendant's objection that it was inadmissible. The evidence as to the loss of the original was as follows:—*Scott*, the manager of the Golden Gate Company, witness for the Plaintiffs, said —“ I saw the letter “ from *Matheson*, of 14th June last, at the Mining Court “ sittings, on 27th July, when there was an argument “ about it; I produced it; I put in several papers; I got “ all the other papers back—not it; I have looked for “ it among all the company's papers; could not find it.”

It appeared that by arrangement between the bank and the trustees of *Eisenstaedter's* estate, the 550 shares were, on 11th June, 1867, sold at auction, and were bought

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in on behalf of the bank, who wrote off so much of their debt as was represented by the price of the shares, leaving a balance due to them from the estate. The other evidence material to the case is set out in the judgment of Mr. Justice *Molesworth*.

Argument.
 —

Mr. *J. W. Stephen*, Mr. *Holroyd*, Mr. *Lawes*, Mr. *T. à Beckett*, and Mr. *Webb* for the Plaintiffs.—The consideration for the Defendant's undertaking was substantially performed by the bank buying in the shares held as security and taking a transfer to their own officers. This was the best mode by which the bank could assume the liability. The assumption of liability by the bank was communicated by *Matheson's* letter to the manager of the Golden Gate Company, and by him to the Defendant, within a reasonable time. The Defendant's undertaking was rather a representation to the bank than a contract, and the bank having, to the Defendant's knowledge, acted on the representation, he was not at liberty to recall it. Independently of the undertaking, there is a clear equity raised against the Defendant by his letter of the 3rd of March, written to induce the shareholders in the A1 Company not to defend. The obligation to observe good faith which binds the members of an ordinary partnership is equally obligatory upon an incorporated company. *Lindley on Partnership*, 2nd ed., Vol. I., p. 584. The Defendant, in breach of his duty as partner, held out by his letter a private benefit to the majority of the partners, to induce them to abstain from making any further defence to the proceeding which was then pending between him and the company, and by which he sought to deprive the company of the most valuable portion of their property. This offer was by subsequent resolution expressly accepted, and no defence was made at the hearing of the case. The Defendant then, for the first time, obtained a decision in his favour: until then nothing was determined. As the claim was obtained in a proceeding undefended through his procurement, he

must be held to have taken it as trustee for the partnership, and the bank are, therefore, entitled to the shares in the Al Company, which, as admitted by the answer, are the exactly adjusted equivalent of the interest in the claim represented by the 550 shares in the Golden Gate Company, which the Plaintiffs took over. There might have been an available defence, if the Defendant had not bought it off; but it is not essential to the case for the Plaintiffs to prove that such defence existed. It is enough to shew that the Defendant wrongfully prevented a defence being made. The inquiry as to whether there was a defence or not, could not be satisfactorily made in this suit. The chances of litigation might have made what seems a bad defence now, a sufficient defence then. We cannot now ascertain the then position of the litigating parties. The false step taken by the Defendant brought him within the operation of an equitable principle, from which he cannot escape by proving exceptional circumstances, as a trustee renewing a lease for himself, cannot exclude the trust for the beneficiary, for whom the renewed term was held, by proving that a renewal would have been refused to the beneficiary. *Keech v. Sandford* (g). The answer admits that all the other partners have acquiesced in the breach of which we complain, and the bank as *cestui que trusts* are properly joined as co-Plaintiffs with the trustees who hold the shares for them. *Nelthorpe v. Holgate* (h); *Perens v. Johnson* (j); *Clegg v. Fishwick* (k).

Mr. Bunny and Mr. Worthington for the Defendant. There has been no sufficient performance by the bank of the agreement relied upon. The assent to the Defendant's proposition, to have been of any value, should have been given immediately in a binding form, in the shape in which it was asked, and to the Defendant himself. The

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(g) 1 W. & T., L. C., 36.
(h) 1 Coll., 203

(j) 3 Sm. & Giff., 419.
(k) 1 Mac. & G., 294.

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Argument.

Plaintiffs' case fails in each of these essentials. Their part of the agreement was, in fact, never performed, though after considerable delay the bank did something different to what was asked, uncommunicated to the Defendant, which, it is argued, was equivalent to what they were asked to do. The Defendant at once expressed his dissatisfaction, and continued to prosecute his appeal in the Court of Mines. No steps were taken in this Court to restrain those proceedings; but a defence was attempted in the Court of Mines which failed. Having failed there, it is now too late to come into Equity. As to the letter of the 3rd March, there was, in fact, no possible defence. The case was concluded by the answers of the Chief Judge, and the final hearing was purely formal. The Defendant entered into no contract to buy off the defence. His promise to give back interests in the claim was purely gratuitous, and after the case was virtually decided in his favour. The claim having been forfeited, did not belong to the company; and the Defendant having recovered it by legal process, was entitled to do what he liked with it, and to return their interests to some partners in preference to others. As to parties, the Plaintiffs nominally interested are improperly made co-Plaintiffs with the bank. *Harrison v. Hogg* (l); *Jones v. Garcia Del Rio* (m). By section 3 of the bank's Act of Incorporation (n), the laying out, employing, or advancing of any of their capital or funds in any trading or mercantile speculation not usually considered as falling within the ordinary and legitimate purposes and operations of banking establishments is prohibited. Dealings in mining shares are evidently within the prohibition, which was violated by buying in the shares in the Golden Gate Company. The Plaintiffs seeking to become shareholders in the Golden Gate Company, under the decree in this suit, are asking for an order in violation of the Act under which the bank is incorporated. The press copy of the letter written by *Matheson* to *Scott* is inadmissible

(l) 2 Ves., jun., 323.

(m) T. & R., 297.

(n) 17 Vic.

under the "*Evidence Statute*," No. 197. There is no sufficient proof of the loss of the original. The concluding words of sec. 29 shew that it is only applicable to cases in which the writing to be proved by the press copy is in the hands of the opposite party; and not to letters sent to third persons.

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—
Argument.

Mr. J. W. Stephen in reply.—The transaction under which the shares were originally taken as security is admittedly within the Bank's Act. By the subsequent buying in no capital or fund of the bank was embarked. The equity of redemption was got in by a proceeding which was substituted for foreclosure. The capital and funds of the bank were altogether unaffected. The only alteration in the bank's position was that a certain amount of debt which was no portion of their capital or funds within the meaning of the prohibition was written off, and the equity of redemption in the security determined. The shares in the A1 Company are sought as the price of an interest in the former company, legitimately acquired and wrongly converted by the Defendant; and the Plaintiffs are merely endeavouring to realize their security by requiring it to be assigned in its converted state. It is, however, not competent to the Defendant to raise either of these objections, even if maintainable by a shareholder of the bank, or a ground for an independent proceeding against the bank for violating their Act. As to the press copy, the section has in practice received a wider construction than that contended for, and its application is not limited by implication.

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March 15.

Judgment.

MR. JUSTICE MOLESWORTH :—

The Bill in this case, by the Bank of Victoria and five trustees for it, seeks to establish a claim to the shares in the A1 Gold Mining Company, equivalent to 550 shares of the Golden Gate Gold Mining Company amalgamated with the A1. Mr. *Eisenstaedter* was registered and held scrip for these 550 shares—the entire number of shares being 1,600—and in January, 1866, deposited the scrip with the bank as security. In July, 1866, he executed a deed of trust for creditors of all his property under the "*Insolvent Act.*" The Defendant Mr. *William Villeneuve Smith* was a large shareholder of the Golden Gate Company, active in its management, not regularly a director, but assumed on several occasions to be, and for the purposes of this suit I think should be treated as a director. He was instrumental in procuring an order for suspending works for three months from the Mining Registrar, 6th September, 1866, and a renewal of it on 6th December, 1866. On the expiration of this suspension some work was done to save a forfeiture. On the 15th of March, 1867, a meeting of members of the company, not including Defendant, was held, and it was resolved to apply for a lease of the claim. In pursuance of this resolution, on 23rd March a notice of application for a lease was published, and all working on the claim was stopped, by which I think the claim, if not before so, became liable to forfeiture. The Defendant was anxious that the mining should be effectively carried on, was totally opposed to the solicitation for the lease, was much dissatisfied with the position of the Bank of Victoria claiming to participate in profits of the company without being responsible for calls. On 30th March he wrote to the applicant for the lease, stating his determination to oppose it as a director of the company, and his conviction that the application was made with the design of keeping the claim unworked. An answer to this was sent to the Defendant through agents of the bank, offering

the Defendant to be made the lessee himself; upon which on the 6th April he wrote to the applicant, stating that his objection was to the lease, not to him as lessee, repeating his conviction that the lease was sought by the large shareholders to avoid contributions to working, treating him as, in fact, an agent for the bank's purposes; and threatening that if the claim were not at once worked, he would take measures to enforce a forfeiture for the benefit of all the shareholders willing to contribute expenses of working.

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 Judgment.

On the 20th of April the Defendant resigned his directorship, and on the 23rd obtained a Warden's summons to be put in possession of the claim as forfeited. On the 26th April Mr. *Scott* was appointed manager of the company, the bank appearing influential in his nomination, and the subsequent proceedings of a majority of the company. On the 27th May the summons was heard before the Warden and dismissed, and the Defendant at once gave notice of appeal. Just after it, on the same day, there was a meeting between Mr. *Scott*, Mr. *Boyd* branch manager of the bank at Wood's Point, the Defendant, Mr. *Justin* a director of the Golden Gate, and Mr. *Hogarth* influential in both the Golden Gate and A1 Companies—as to which there had been previous efforts for amalgamation—which terminated in an agreement, or proposed agreement of that date, written and signed by the Defendant, addressed to nobody;—"I hereby undertake to withdraw my application for the possession of the Crown land in the late occupation of the Golden Gate Gold Mining Company, and also to agree to an amalgamation with the A1 Company, in consideration of receiving eighty shares of the amalgamated company, and also in consideration of the Bank of Victoria giving an undertaking to meet the liabilities on Mr. *Eisenstaedter's* shares in the said company so long as the said bank shall hold the said shares as security, and have the right to draw the dividends, if any, therefrom." This

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 —
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document was left with *Boyd*, and sent to the bank at Melbourne. *Scott* went there about the same time, and had communications with Mr. *Harrison* (inspector of branches for the bank), who intimated that the bank would accede to its part of the arrangement. *Harrison* communicated with Mr. *Matheson*, the principal manager. *Matheson*, on 31st May, wrote to *Eisenstaedter's* trustees, proposing that they should extinguish their reversionary interest for a nominal sum, as it would be unfair that the bank should risk its money to reorganise the Golden Gate Company for the possible ultimate benefit of the estate, which would not be responsible for the money if lost. The trustees answered this on 3rd June, stating that the shares were of some value, referring to the proposed amalgamation, declining *Matheson's* proposal, suggesting that the bank should either put up the shares to auction or value them in the usual way, when the trustees would either consent, or take them over. The trustees and bank ultimately agreed that the 550 shares should be advertised and sold by auction, as for the trustees. This auction occurred on the 11th June: there were real biddings, and the bank bought, through a trustee, at 50s. a share—£1,375—and took the shares at that price as between it and the trustees, giving credit for so much of the debt due by *Eisenstaedter* to it. On the winding-up of this matter on the 19th of July, *Eisenstaedter* transferred the shares on the registry to four of the co-Plaintiffs, but as trustees for the bank.

To return to the Defendant, he had impressed upon *Boyd*, on the 27th of March, the necessity of the bank answering promptly. *Boyd* went to Melbourne, and returned (6th June) without any authority from *Matheson* to complete the arrangement. On the contrary, *Matheson* had spoken to him doubtingly about it. Defendant had learned something of the sale or intended sale by auction, and met *Boyd*, say 10th June. He charged *Boyd* with having misled him, as the shares were sold for which he

had promised that the bank would become liable, and with having gone to Melbourne to get the bank to sell the shares and evade the liability. *Boyd* denied that: he said he knew nothing of the sale, except that *Harrison* had told him that the trustees were about selling the shares, and consulted him about the value as to the bank buying them. The Defendant further says that *Boyd* then told him that the bank would never agree to give any undertaking, and he might make the most of his appeal. This *Boyd* totally denies.

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It is alleged—and I have no doubt—that *Matheson*, on the 14th of June, wrote to *Scott*:—"Referring to my conversation with you as to the shares in your company standing in the name of *Eisenstaedter*, I beg to inform you that the bank is interested therein as holding them as security against *Eisenstaedter's* liabilities, and we undertake to see all calls or other expenses thereon duly paid while the said shares remain in their present position.—J. MATHESON, General Manager." This was sought to be proved by a press copy. *Scott*, examined as a witness, did not I thought prove sufficient search for the original to let in secondary evidence. The "*Evidence Act*" No. 197, sec. 29, makes press copies *prima facie* evidence without comparison, "and without any notice to produce the original." This latter part obviously relates only to documents in the hands of the opposite party, not those in the hands of third persons, producible under subpoena *duces tecum*, of which secondary evidence can be given after proof of loss, &c. The old rule of the necessity of having the best evidence is material as between originals and press copies. An original may be materially altered after the press copy is made, and truth may be elicited from an original on many points not presented by a press copy. The Act makes a press copy evidence without comparison, but does not, I think, make it primary evidence except as to dispensing with notice to produce. For this reason I

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intimated at the taking of evidence that I would not receive the copy, and now direct that it (exhibit K) be not entered as read.

On the 11th of July, and not before, *Scott* informed the Defendant by letter that he had got such an undertaking; and on the 15th of July Defendant answered him, saying, "Referring to the Bank of Victoria guarantee, I have only to say the document signed by *Matheson* is not a carrying out of *Boyd's* undertaking to me, particularly as I am informed that within a few days of the discussion of the proposed arrangement in my office at which you were present, the bank caused the shares in question to be bought at a pretended auction by one *Gale*, a clerk, as I am told, in Mr. *Schlesinger's* office. After so much subterfuge, I must decline any further correspondence in the matter."

As to another subject of the proposed arrangement, on the 15th of June *Scott* sent Mr. *McFarland*, who held a transfer of sixty shares Golden Gate, the scrip corresponding, directing him to hand them to the Defendant, telling him that he might hold them over, if he liked, until the amalgamation was completed. The Defendant gave a receipt for this on the 25th of June:—"Received the within scrip with a transfer but scrip itself not signed or transferred." I have not fully caught the history of these shares. The Defendant says that the originally proposed amalgamation was broken off, and the scrip, &c., returned. Ultimately an amalgamation was made between Defendant, as holding the Golden Gate claim, and the A1 Company, in which the Defendant got the benefit of sixty shares additional of the Golden Gate, the same as provided by the agreement of 27th May, but that, he insists, should be regarded as unconnected with the former. On the 26th of June the Defendant wrote to the manager a document:—"I hereby consent that the property and quartz claim

held and lately forfeited by the Golden Gate Gold Mining Company (Registered) shall be amalgamated on equal terms with the property of the A1 Company, such amalgamation to date from the 27th May, 1867; and I hereby undertake to reconvey and assign the shares specified on the opposite side hereof to the parties named there, in the event of my forfeiture complaint being upheld on appeal, and in any event I agree to the amalgamation on the terms aforesaid." The names and shares specified were of all the shareholders except *Eisenstaedter* and the Plaintiffs.

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On the 31st of July, 1867, the appeal came on before the learned District Judge. Mr. *Zincke* was heard as attorney for the Golden Gate Company, and admitted as a witness that he was employed by the bank. Mr. *McFarland*, as barrister, sought to be heard as for two of the Plaintiffs as shareholders, but was refused. The Defendants produced a document under the seal of the bank to the same effect and date as *Matheson's* letter of 14th June, but the learned judge rejected it and all the documents about the compromise of 27th May, and refused to notice them in a special case he prepared—rightly I think, for an appellate judge should hear an appeal without reference to negotiation for compromise after the decision below. Ultimately the learned judge stated a special case for me, as Chief Judge of the Court of Mines, with the following questions:—"Was there such an application for a lease as to protect the land and to avoid the duty of working the land under the Beechworth by-laws? and was the relation existing between the appellant as a shareholder in and director of the company of a fiduciary character, such as to prevent the former enforcing a forfeiture?" That case was heard and fully argued before me on the 2nd of March, 1868, when I gave judgment on both points for the present Defendant, and sent an answer accordingly. The next day the Defendant wrote a letter to the company's solicitor, stating that he still held himself bound to reconvey to the

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shareholders named in the document of 26th June, 1867, but informed the gentlemen calling themselves directors that if they continued to enable the bank, against which alone it was his intention thereupon to enforce the forfeiture, to litigate with him under the name of the company, he would from thenceforth treat the litigation as between him and the whole of the shareholders who, either as directors or as members, at any meeting of shareholders authorising the directors, continued to support the bank in its litigation. On the 11th of March the company met and agreed to Defendant's proposal, the bank protesting. On the 25th of March the appeal was again heard; Defendant succeeded, unopposed. The next day he renewed the offer. The amalgamation was afterwards effected. On the 22nd of August the bill was filed.

Preliminary objections to this bill are raised by answer, and have been argued before me:—First, that the Plaintiffs, trustees for different shares making up 550 for the bank, cannot join it as co-Plaintiffs. This objection I would not concur in. I think the Plaintiffs have an unity of interest. If the case presented a different aspect as to different Plaintiffs, the difficulty, I think, might be got over by amendment, but as to all it is the case substantially of the bank. Another preliminary objection is, that the bank is seeking to be put into possession of shares of the A1 Company, taking which is forbidden by its Act of Incorporation, 17 *Vic*, as "investing, laying out, employing, or embarking part of the capital or funds in any trading or mercantile speculation or business whatsoever, not usually considered as falling within the ordinary and legitimate purposes and operations of banking establishments." I concur in this objection that the bank managers in regard to the interests of both their shareholders and creditors cannot, consistently with this prohibition, embark in mining as partners or

shareholders, and that even in companies as to which the liability is restricted by the Act No. 228. My other observations are to be taken as clear of this objection.

As to the merits of the case, it seems clear that the Golden Gate Company's claim was forfeited to any one proceeding for a forfeiture. If the Defendant had caused the forfeiture as a director he might perhaps be held in the Court of Mines as unable to enforce it, or in a Court of Equity be made responsible for it, or be held a trustee for the company for any interest he acquired. But there is no evidence that he caused the forfeiture. As a director he had only a vote, and seems strenuously to have urged that the company should make calls, work, and avoid a forfeiture, and openly threatened that otherwise he would pursue the course he did. The bill presents the agreement of 27th May, 1867, as between the Defendant and the company, conditioned upon the company procuring the consent of the A1 Company to the amalgamation, giving the Defendant the proposed personal benefit, and the consent of the bank to the guarantee required. Now as to this, the consent of the bank should have been obtained and communicated with promptitude. *Boyd* and *Harrison* were not plenipotentiaries: their principal, *Matheson*, hesitated. If I could regard his letter of 14th June, it should be noticed as to its efficacy that the position of the bank was altered by the sale (11th June); the bank was not (14th June) interested as holding the shares as security, but had become shareholders. Defendant's objection as to the bank seal being requisite would be, I think, well founded. Entering into such a guarantee would not, I think, be such an ordinary banking business as a manager could bind the bank to, and the fact of the bank's consent in any way was not communicated to the Defendant until 11th July. It is said all Defendant's objects as to the guarantee were as well obtained by the bank purchasing and getting the shares assigned on the

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registry to its trustees. That was not what the Defendant bargained for: under it the company would have to seek a separate remedy for calls against different people, not perhaps as solvent as the bank. The Defendant insists—and I think according to the fact—that the writing, 27th May, was a proposed bargain with the bank, and relies on the same objection as to its non-performance. I think the transaction between the bank and the trustees, by which the bank took the shares, was a fair one regarding the other parties; that the Defendant had no right to complain of it as a fraud upon the proposed bargain in the way he did, influenced by the information he got; but I think his conversation with *Boyd*, under a resentment, right or wrong, was a repudiation of the proposed bargain before the 14th of June, and his letter of 13th July was a repudiation of any bargain between him and the company.

The part of the case which has most pressed me is the considerable benefit the Defendant got by the amalgamation, which might be taken as a consideration moving from the bank, so far as the amalgamation and his getting the benefit rested upon its concurrence. The agreement of the 27th of May being regarded as between the two companies, the bank, and the Defendant, of which the additional shares was a large motive to the Defendant, and the other three parties being ready within a reasonable time substantially to fulfil their contract, I am not sure but that if a proceeding had been taken before the hearing of the appeal (31st July) to compel its specific performance as between four parties it might have succeeded, but instead of that the case was heard; and it is too late to enforce an agreement embracing a compromise of litigation which a party has repudiated, by other parties who let the litigation take its course, and took their chance of success which they thought was considerable. If the Defendant had failed in that litigation, which was in

suspense from the 31st of July to the 2nd of March, he would have been without remedy.

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As to the Defendant having bought off the opposition of other shareholders, his announcements were open, the bank was able practically to litigate every available point, and did litigate it, and cannot now suggest any defence to the Defendant's suit in the Court of Mines which could have been, but was not, made. If Defendant has a great many more shares in the Al Company than represent his old shares as between him and the bank, he owes them to his having succeeded in a suit for forfeiture, and may hold them, giving up part of the fruits of his success to other shareholders whom he prefers to the bank.

There is another case urged for the bank, which should be noticed as to its transactions with the trustees. The case made by the bill is as if everything had gone on amicably under the document of the 27th May; *Matheson's* letter (14th June) being sent, received, communicated to the Defendant, and supposed to be acted upon; and as if afterwards the bank, relying upon its position and the document of 27th May as enhancing the value of shares, had agreed with the trustees to retain the shares at £3 10s., when the Defendant might have contemplated the probability of such a bargain; the real fact being that while the agreement of the 27th May was an unaccepted proposal, the bank having in no clear way intimated its consent, the adjustment between the bank and the trustees was effected by what appeared to the public as the trustees alone selling the shares by auction—a transaction of which the Defendant was wholly ignorant until its completion—and which, so far from directly or indirectly encouraging, he at once stigmatised to the local bank manager as a fraud upon the agreement proposed, and a ground of his repudiation of it. Any other person who dealt about shares in the company, buying or taking security, being

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aware of the document of the 27th May, would have a stronger pretence of an equity than the bank against the Defendant to compel him to perform it. It is unnecessary for me to notice some questions as to want of parties. For the above reasons I dismiss the bill with costs.

Appeal.

From this judgment the Plaintiffs appealed. The notice of appeal served on the Defendant was headed as follows:—"Take notice that it is the intention of the abovenamed Plaintiffs to appeal to the Supreme Court in Banco from the decree, &c.; and take further notice that such appeal is intended to be made on the following grounds." The grounds of appeal were then set out, and the notice concluded—"And take further notice that the Plaintiffs have paid into Court the sum of £50 as security for costs to abide the event of such appeal." Endorsed on this notice was a receipt by the Chief Clerk in the Master's office as follows:—"Received from the Plaintiffs' solicitors a cheque for the within-mentioned sum of £50."

April 16.

The Defendant now moved in person, before Mr. Justice *Molesworth*, to set aside this notice as irregular, on the grounds that the notice was of "intention" only and not of "desire" to appeal, as required by the Act 19 Vic., No. 18, sec. 5; and that the delivery of a cheque was not a payment of £50, as required by the Act.

MR. JUSTICE MOLESWORTH (without calling on counsel for the Plaintiffs, who appeared upon notice). I consider the case now out of the hands of this Court except so far as carrying out the decree is concerned. If I were to decide upon this objection, there might be an appeal to the full Court against my decision. The general practice in appeals is, that objections to the appeals must be dealt with by the superior Court. I shall refer the motion to the full Court.

The motion now came on for hearing, with the appeal, before the full Court (o).

The Defendant in person in support of the motion.— Desire, and intention, are not synonomous terms. An act may be intended which the actor does not desire to perform but anticipates as the consequence of compulsion; and many things are desired which are not intended to be done. A cheque is not money. If money's worth, or what may be turned into money, is to be accepted as a sufficient deposit of £50, the Master in Equity may be given mining shares, or a flock of sheep. When an Act requires in distinct terms certain things to be done, it is no excuse for non-compliance to say that something else has been done, in effect though not in fact, the same. *Dan. Ch. Prac.*, 4th ed., p. 1362; *Shore v. Wilson* (p); *Pratt v. Williams* (q).

THE CHIEF JUSTICE:—

The Act prescribes no particular form of notice of appeal—no particular words are to be used. The Appellant must do something that will convey to the opposite party the knowledge that he wishes to appeal. The word "intend" used in this case, I think, is sufficient; it is stronger than "desire," and plainly shews the wish of the party. Then, as to the £50, I am of opinion that that was a matter for the clerk. If he chose to take a cheque he did so at his own risk, and he had no right to trouble the Court with it. He ought to take it or refuse it. If he refused it, well and good; if he relied upon the good faith of the solicitors and took the cheque, he ought not to have said anything about it. But he took it at his own peril of having to make good the money, if necessary, to the opposite side. I think that the Act has been substantially complied with.

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May 13.
Appeal.

(o) *Coram, Stawell, C.J., Barry, J., and Williams, J.*
(p) 5 *Scott's N. B.* 958. (q) *Ante, Law, 22.*

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MR. JUSTICE BARRY and MR. JUSTICE WILLIAMS concurred.

Motion refused, with costs.

May 13, 14, 15.

Argument on Appeal.

Mr. J. W. Stephen, Mr. Holroyd, Mr. Lawes, Mr. T. A'Beckett, and Mr. Webb for the Plaintiffs (Appellants).

The Defendant appeared in person and argued the case on his own behalf, upon the same grounds as argued before, except as to objections in respect of parties to the suit, which were not renewed in the argument upon appeal.

The Plaintiffs' case was argued as before, and on the bank's right to hold shares, *In re Asiatic Banking Corporation, Bank of India's Case* (r), was referred to.

Cur. adv. vult.

September 2.
Judgment on Appeal.

THE CHIEF JUSTICE read the judgment of the Court as follows:—

Appeal from a decree dismissing a bill to establish the right of the Bank of Victoria and five other Plaintiffs—trustees for the Bank—to certain shares in the A1 Gold Mining Company. Preliminary objections were taken to the maintenance of the suit. The Plaintiffs—trustees for the bank of several shares—could not, it was said, join in one bill. This objection received, in our opinion, a full answer in the judgment delivered; it is unnecessary, we think, to repeat it. The object of the suit, it was also urged, was opposed to the provisions of the statute by which the bank was incorporated.

The facts of the case, so far as they relate to this second objection, are very simple. In January, 1866,

(r) L. R., 7 Eq., 91, & 4 Ch. App., 252.

Denis Eisenstaedter, a customer of, and indebted to the bank, deposited the scrip of 550 shares in the Golden Gate Company as security. In July of the same year, by a deed in the usual form, he assigned all his property to trustees, in trust for creditors. In the early part of the year 1867 an amalgamation between this Golden Gate Company and the A1 Company was contemplated; this amalgamation being likely to be attended with a larger expenditure than usual, in order to put the mine in working order. Before embarking thereon the bank proposed to the trustees that their equity of redemption in the shares should be assigned to the bank for a nominal sum. The trustees, in answer, suggested a sale by auction, with a view of testing their value, at which value they (the trustees) could afterwards elect to take the shares or not. The suggestion was adopted, and on the 11th of June, 1867, they were offered for sale by the trustees, and bought in by the bank at 6*d.* per share over the highest bid. The trustees did not take them at this price, and the amount of the purchase money was written off the debt, leaving a considerable balance still due. The initiation of the transaction is not questioned. The bank became legitimately interested in the shares; the security they afforded was insufficient to cover the debt; an expenditure in working the mine was contemplated, by which the shareholders fairly and reasonably hoped to improve the value of the shares, and the bank that of their security.

Now these facts form, in our opinion, the turning point of the case respecting this objection. Had there been any dispute about the power of the bank to advance money to a customer on a deposit of shares—had the value of the shares themselves nearly approached the amount of the debt—or had the shareholders been about to enter upon an improper expenditure, the case would have been different. We need not decide whether, under any of such circumstances, the bank could, in the exercise of a

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reasonable discretion, have pursued the course they did. They are clearly not to traffic in shares, or unwisely to incur risk with a hope of ultimately making a profit either on the shares or the debt for which such shares are security. They are, however, the judges of the best mode of making the most of securities given in due course of banking business. It can scarcely be maintained that it is not competent for a mortgagee to adopt any measures the law allows to obtain the equity of redemption in an insufficient security. In this case the value was fairly tested by public competition. The trustees were satisfied that it was best for *Eisenstuedter's* estate that they should not take the shares, but allow the amount at which the bank purchased to be written off the debt, which was thus reduced; and we think the mortgagee, acting with the consent of the mortgagor's assignees, did nothing more than might have been substantially effected by the expensive and tedious process of a suit in equity.

The objection may thus be reduced to one of form as to the mode of proceeding by which the equity of redemption was got in, rather than of substance as to whether the Act of Incorporation had been violated or not; but we rest our opinion on broader grounds. We think that whilst, on the one hand, it is the duty of the Court to protect shareholders by carefully seeing that all the provisions of the Charter or Act of Incorporation are observed, on the other hand, it is not their duty—the initiation of the matter having been legitimate—to interfere with the exercise of a proper discretion on the part of the directory respecting either the management of securities, given in due course by a customer to the bank, or the mode by which those securities are to be rendered most available. We think the *Royal Bank of India Case*, to which we were referred, especially the judgment of the Lords Justices on appeal, although it does not expressly lay down, yet fully supports this view of the case. The

Lord Justice *Selwyn* is thus reported :—" If it is once established that it was within the authority of the directors to lend money upon the security of shares, it necessarily follows that anything which was a prudent act for them to do with a view to obtaining the benefit of such security, was equally within the scope of their authority;" and the Lord Justice *Giffard*—" Yet a banker is authorised to lend upon securities of that description, and he is authorised to take every rational course for the purpose of making his securities good and available." We think this objection also is not tenable. Want of parties was alluded to in the judgment, but none were specified, and the objection was not mentioned during the argument on appeal. We proceed therefore to consider the case itself, which, so far as the merits are concerned, is attended with rather peculiar circumstances.

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In March, 1867, an application for a lease of "the claim," as it is termed, to a person named *Schlesinger* was made, ostensibly on behalf of the Golden Gate Company. On the 6th April the Defendant wrote to *Schlesinger* respecting his (the Defendant's) then intended opposition to this lease, stating in effect that the application was made in order to evade working the ground. It should be mentioned that as lessees, the shareholders would avoid any risk of forfeiture, to which as licencees they might be subjected for non-compliance with the by-laws, requiring claims to be regularly worked. The Defendant in this letter avowed his intention of enforcing a forfeiture if the claim was not worked, this forfeiture being for the benefit of those shareholders who were willing to contribute the expenses of working. On the 20th of April, as a matter of caution, he gave notice of having ceased to act as a director, for he had not at any time been appointed to the office; and on the 23rd he commenced proceedings by plaint in the Warden's Court to have the claim declared forfeited for a breach of the by-laws. On the 27th of May

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the plaintiff was heard and dismissed; and on the same day the Defendant, having met the branch manager of the bank and a shareholder in each company, signed the document of that date; notice of appeal against the Warden's decision having been given within four days afterwards. On the 14th of June a letter, purporting to be an undertaking by the general manager of the bank to see all costs and expenses on the shares duly paid, was sent to the manager of the mine. On the 15th unsigned scrip of sixty shares, accompanied by a blank transfer, was sent to the Defendant in pursuance of the proposed agreement of the 27th May; and on the 25th of June a receipt was written by the Defendant on the letter enclosing the scrip. On the next day (the 26th) a document was signed by the Defendant; it was sent by him to the manager of the claim, undertaking *inter alia* to assign the shares as therein specified in the event of his forfeiture complaint being upheld on appeal, such assignment being to all the shareholders except the bank.

On the 31st of July the appeal was heard and a case reserved. On the 2nd of March following the points reserved were answered substantially in favour of the Defendant. On the 3rd of March he wrote in effect renewing his offer of the 26th June to all the shareholders except the bank. On the 11th of March those shareholders accepted the offer, and on the 25th the appeal was allowed—no one appearing in opposition. The document of the 27th of May, taken in connexion with the acts of the parties, causes no small difficulty in this case. It is a proposal by the Defendant, which, if accepted, would have been an agreement between him, the bank, and the two companies. From the subsequent acts of some of these four parties, this document appears to have been treated as if the consideration was divisible and might have been apportioned—the eighty shares as a consideration for the amalgamation—the guarantee or undertaking by the bank

as a consideration for abandoning the appeal against the dismissal of the plaint to enforce a forfeiture. But the terms of the writing itself scarcely support such a construction. The acceptance of this agreement by the bank was delayed for apparently an unreasonable time, and for this delay no explanation has been offered; the acceptance was ultimately conveyed in a letter addressed to the manager of the mine. We concur in the decision as to the non-admissibility as primary evidence of a press copy in the hands of a stranger; but the fact of an undertaking of some kind having been given seems to be admitted by the Defendant's letter of the 15th July.

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By this letter the Defendant does not object to the undertaking on account of the delay which had been allowed to occur, but to the form of the undertaking itself, as it was signed only by the general manager, to his (the defendant's) not having possession of the original, and to the shares having been transferred to trustees for the bank. The objection as regards form is no doubt of some weight; but according to our view of the case, in considering the second objection, the lending money on these shares as a security was part of legitimate banking business, and if so, the bank as mortgagee in possession, might reasonably be expected to have to pay calls in order to prevent forfeitures or other hostile proceedings. With such matters the general manager ought, we presume, to have power to deal. The objection at most is one rather of form than substance, for practically it can scarcely be supposed that the bank would have dishonoured an undertaking of their general manager for such an object.

We think the letter embodying this undertaking was properly addressed to the manager of the mine, and not to the Defendant. The Defendant's grievance was a grievance to him as a shareholder, not to him individually. It consisted in the mine being allowed to

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remain unworked, because, as he contends, some of the other shareholders would not contribute their proportion of expenses. The agreement to pay those expenses was of benefit to the general body of shareholders. The undertaking must have been enforced by the manager on behalf of that body, not by any one individual shareholder. The giving the undertaking at the request of the Defendant might form a sufficient consideration to sustain a promise by him, but given in pursuance of the document of the 27th May, it was properly addressed, we repeat, to the manager. We cannot see how the Defendant was prejudicially affected by a transfer of the shares to trustees for the bank; he asked for and would have been satisfied, we must take it, with a guarantee from the bank. The scrip only for these shares was then in the possession of the bank; the equity of redemption was in *Eisenstaedter's* trustees. If the bank were shareholders, the guarantee was unnecessary.

Apart from the technical objection as to necessity for the bank seal, the Defendant was, to say the least, in no worse position by the shares having been transferred to trustees for the bank than he was before they had been so transferred. If the guarantee was valid, it was comparatively immaterial in whose name the shares stood. In fact, as the trustees of *Eisenstaedter's* estate would scarcely be liable for calls, the Defendant's position was rather improved by the transfer; so that the objections are really resolvable into delay, which was not taken, and into the absence of the corporate seal, which we are disposed to think is not sustainable. The Defendant's letter of the 15th July may, perhaps, be regarded as a rescinder of the contract so far as the bank is concerned, although no reference is made in it to the subject of the Defendant's conversation with the branch manager; but it certainly does not, in our opinion, treat the proposed amalgamation as at an end.

On the 25th June the Defendant signed a receipt for the scrip which had been forwarded on the 15th. The Defendant held 100 shares in the Golden Gate Company, and these 100, with the sixty, the scrip of which had been thus forwarded, amounted together, as we understand, to the equivalent for the eighty shares in the amalgamated company, as mentioned in the proposal of 27th May. On the day after signing that receipt, the Defendant wrote the document of the 26th June, undertaking to carry out the proposed amalgamation under any terms—whether he succeeded in his forfeiture complaint or not. If he did succeed, it may, perhaps, be put that the allotment of shares, as he proposed in that document, formed a consideration for the proposal; but if he did not succeed, it is difficult to discover what was to form the consideration for this proposed amalgamation. If the offer of the 27th May was still in force, the document of 26th June was unnecessary; if it was not in force, it does not appear why the scrip for sixty shares was retained. Their retention shewed that no rescinder of the proposal of 27th May was intended; no reference is made to these shares in the document of 26th June; they could have formed, therefore, no consideration for that proposal. At a period subsequent to the 15th July, as we understand, these scrip were voluntarily, the Defendant states, returned by him to the purchaser from Mr. *Hogarth*, Mr. *Hogarth* having been the shareholder who, anxious to bring about the amalgamation, had caused the shares to be forwarded to the Defendant; but there is no doubt that ultimately the Defendant, exclusive altogether of the shares held by the bank in the Golden Gate Company, did receive and retain these eighty shares in the amalgamated company. He contends that this is a separate matter, and not to be mingled with the original offer of the 27th May, but we cannot so regard it. The retention of the sixty shares, forwarded as they were, is evidence against him, in our opinion, that the offer of 27th May was accepted by the companies, and acted on by him.

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The question, therefore, remains whether it was competent for the Defendant to have received and retained part of the consideration under this agreement, and yet decline to receive the remainder; in fact, hold the agreement in force as to one part, and not in force as to all the other parts? This question, however, does not decide the case; for supposing it to be answered in the affirmative, it must still be determined whether, though the bank had committed a breach of that agreement, the Defendant was justified not merely in pursuing the course he did, but also in adopting the means he used to gain his object; namely, the obtaining a forfeiture of the mine, and forcing the bank out, because they did not contribute to the working as he thought they ought to have done.

We cannot say that any principle of equity is actually violated by one of several shareholders endeavouring to forfeit for his own personal benefit a mine, the working whereof formed the subject matter of the association, but a shareholder ought in that, as in all other acts, to treat all his co-shareholders alike, whether that treatment be amicable or hostile. He cannot be permitted to deal with one shareholder as if he was still his partner in the undertaking, and another as if he was not. Now, throughout the whole transaction, the Defendant appears to have considered himself justified in acting differently towards the bank and all his other co-shareholders. Commencing with his letter of the 6th April, 1867, to the manager *Scott*, continued by the document 26th June in the same year, it terminates in the offer repeated by his letter of the 3rd March, 1868. The offer of 26th June was made whilst the proposal of 27th May was pending, and the day after the Defendant had admitted the receipt of sixty shares in acceptance and part performance by the companies of that proposal. It may be urged that this apparently sudden change of purpose can be excused on the supposition that the bank was the only shareholder

against whom the Defendant was acting; but if so, apart from every other objection, the bank, in common justice, ought to have been apprised of the change in the Defendant's views.

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In March, 1868, immediately after the decision of the Chief Judge of the Court of Mines, the Defendant repeated the offer of the 26th June previous. If that offer was still existing, the necessity for this renewal is not very apparent. It seems difficult to discover any reason for not waiting until the ultimate decision of the Court of Mines had been pronounced on the 25th of the same month, unless it was intended to influence in some degree the acts of the shareholders to whom the proposal was made. It is urged that these proposals were made openly, and that the Defendant's intentions were never concealed. It is possible that may have been so, and from the evidence we think it was; but that does not, in our opinion, justify the act. Whether done secretly or openly, it is still an offer made to the advantage of some, and to the prejudice of others, of the shareholders, and calculated, therefore, to produce an unfair effect.

It was also urged that the acts of the shareholders in no way affected the ultimate decision of the case, and that the bank was afforded every opportunity of advancing any objections against the forfeiture. We question whether that is so, especially as the Defendant's last proposal, of 2nd March, 1868, was accepted on the 11th, despite the protest of the bank; but we cannot discover how this, even if it were so, lessens the force of the objection. The Plaintiffs assert, and we think properly, that the Defendant's acts amounted to a sale of the Golden Gate Company to the A1 Company, the consideration for the sale consisting in the shares which he retained being allotted to him, and the other shares to the shareholders in the former company as he specified, and the bargain

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for this sale was brought about by unfair means. The fact that the forfeiture would have been decreed without the use of these means does not justify their use. The unfairness or impropriety of the means used does not depend on the result. Even in ordinary sports, non-observance of the rules disqualifies a competitor, and if successful he is deprived of the prize, although beyond all doubt he would have won if he had observed the rules. No principle of equity is better established, than that prohibiting the use of unfair inducements, leading to the entering into a contract. Such an agreement is, in equity, deemed corrupt, and cannot be sustained.

The Defendant might possibly have succeeded in obtaining this forfeiture without having written any one of the three documents mentioned; his writing the third at the last moment before the final decision was pronounced does, unexplained, suggest that he thought it was of use, or he would not have used it. That offer was formally accepted, and the application for forfeiture was not opposed. It may be that the Defendant laboured under an impression that the conduct of the bank towards him, was sufficient to warrant his acting as he did; and that in this case the end justified the means. But we cannot accept that as an excuse. The facts remain that an offer was made to all the shareholders except the bank; that that offer was calculated to induce those shareholders to withdraw all opposition; was accepted; was acted on; no opposition was offered; and the Defendant received all the benefit of the shares formerly held by the bank. No contract made in such a way can be allowed to stand in a Court of Equity.

We think the Plaintiffs entitled to the relief prayed, but we cannot approve of their conduct throughout. The Defendant preferred, in our opinion, a reasonable request, and was actuated in so doing, so far as

we can discover, by no other desire than to get the mine worked. This request was not at last acceded to, or if acceded to, it was not communicated to the Defendant, and an unexplained delay followed. We ought not to allow the Plaintiffs their costs of a suit which we cannot but think would not have been necessary if more promptness had been evinced in complying with a fair demand. We allow the appeal; and as the Appellants have, in our view of the case, been successful, we feel bound, according to the principles by which we have been hitherto guided, and in the absence of any exceptional circumstances, to allow them their costs. The decree will be as prayed, without costs; but the Defendant must necessarily have been subjected to expenses in working the mine, in order to prevent a forfeiture, between the times of the dismissal of the plaint in the Warden's Court and of the allowance of the appeal in the Court of Mines. These expenses he has not, so far as we can discover, been reimbursed. We think, in addition to the calls and expenses on shares, which the Plaintiffs offer to pay, the Defendant should also be allowed all such first-mentioned expenses as he has actually incurred and has not been reimbursed. So far the decree would vary from the appeal. Appeal allowed, with costs. Decree as prayed, with above additions, without costs. Leave to apply reserved. Deposit to be returned.

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April 5.
May 11, 12.
September 2.

H. & Co.,
brandy manu-
facturers,
exported to
Victoria their
brandy in
bulk and also
in bottle, the
latter being of
superior
quality to,
and with a
distinctive
flavouring
from, the
former. *W.*
purchased
H. & Co.'s
bulk brandy,
and bottled
and sold it in
bottles with
corks, cap-
sules, and
labels, colour-
ably imitating
those of *H. &*
Co.'s bottled
brandy; but
with the
addition in
small letters
at the bottom
of the label of
the words
"Bottled by
W. & Co."

Held, by
the full Court,
affirming
Molesworth J.,
that *H. & Co.*
were entitled
to an injunc-
tion to restrain
W. from sell-
ing the brandy
in bottles with
labels, &c., so

colourably imitating the Plaintiffs'. *Farina v. Silverlock* distinguished.

Per *Molesworth J.*: The imitation of the Plaintiffs' brand on the corks was strong evidence of an intention to represent the article as *H. & Co.*'s bottled brandy.

HENNESSY v. WHITE.

MOTION for an injunction to restrain the sale of brandy in bottle, got up for sale so as to resemble brandy bottled by the Plaintiffs.

The Bill alleged that the Plaintiffs, carrying on business in partnership as brandy merchants, at Cognac in France, under the style of *Hennessy & Co.*, had acquired a high reputation for their brandy in different parts of the world, and in Victoria. That they sold their brandy in cask and in bottle, and that the character and quality of their brandy in bottle were and had always been different from and superior to those of their brandy sold in cask. That they used as their trade marks for brandy bottled by them labels, corks, and capsules, bearing certain distinctive designs and words set out in the bill. That the Defendant bought the Plaintiffs' cask brandy and other and inferior brandy, and in the course of his business bottled it off for sale in bottles similar to the Plaintiffs'. That as to some of the brandy so bottled, the Plaintiffs' labels, corks, and capsules, were exactly imitated; and as to some, colourably imitated (in the manner stated below). That the imitation was fraudulent, for the purpose of selling, or for re-sale, as the Plaintiffs' bottled brandy, brandy which was not the Plaintiffs' bottled brandy. That the Defendant had effected large sales of the brandy bottled by him, and thus injured the Plaintiffs by diminishing the sale of their bottled brandy and lowering its character in the market.

There was no evidence to sustain the alleged exact imitation. As to the other class of imitation, as to which the

injunction was sought, the resemblances and differences were as follow :—The bottles and contents were apparently the same. The labels were the same in shape, colour, and design, except that a spread eagle in the Defendant's was substituted for an arm holding a battle-axe in the Plaintiffs'. The lettering of the labels was the same in character, but instead of "*Jas. Hennessy & Co., Cognac,*" was "*Jas. Hennessy & Co.'s Cognac,*" and the words "Registered at 304 Stationers' Hall," printed in small type at foot of Plaintiffs' labels, were omitted from the Defendant's; and under the word "Cognac" in the Defendant's label, and not in a prominent position, were the words "Bottled by *T. & W. White, Melbourne,*" printed in small type. The Plaintiffs' capsules had an amber-coloured rim, which the Defendant's had not; the Plaintiffs' capsules were also stamped with the battle-axe and the words "*Jas. Hennessy & Co.,*" and the Defendant's capsules with the spread eagle and the words "*Jas. Hennessy & Co.'s Cognac.*" The Plaintiffs' corks were stamped "*Jas. Hennessy & Co.,*" with a small star beneath; the Defendant's "*Jas. Hennessy & Co.'s Cognac,*" but without any star; and the stamps on both corks, could be seen through the necks of the bottles.

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—
Statement.

Mr. *J. W. Stephen*, Mr. *T. A'Beckett*, and Mr. *Cock*, for the motion. There is a colourable imitation of the label as a whole, and an exact imitation in most of its details. The use of the Plaintiffs' names on the Defendants' corks and capsules, is a pretence that the Plaintiffs are the bottlers. The words "Bottled by *T. & W. White*" are so printed as to escape observation, and if observed would induce the misconception that they were authorised to bottle for the Plaintiffs. There is a clear attempt to deceive, and the Defendant cannot be heard to say that the attempt is unlikely to succeed. The resemblance need not be of such a character that the genuine article cannot be easily distinguished from the imitation when compared with it:

Argument.
—

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Argument.

Seizo v. Provesende (s). The use of only part of a trade-mark will be prevented : *Braham v. Bustard* (t). It is not necessary to prove actual deception, nor that purchasers from the Defendant are deceived, if they are enabled to deceive others : *Edelsten v. Edelsten* (v). It is no answer to say that none but incautious persons can be deceived : *Glenny v. Smith* (w). In *Farina v. Silverlock* (x) an injunction was refused to restrain the sale of labels for Eau de Cologne, which were exact imitations of the Plaintiff's label, but the ground of refusal was that the intended use was for the Plaintiff's Eau de Cologne, and that consequently no misrepresentation could be made. Here the labels are not used for the Plaintiffs' bottled brandy, but for their cask brandy, which is for trade purposes an essentially different spirit, and the principle of *Farina v. Silverlock* does not apply.

Mr. Laves and Mr. Webb for the Defendant. We rely on *Farina v. Silverlock*. The Defendant sells the Plaintiffs' brandy, and is entitled to say so by his labels, corks, and capsules. All chance of misconception is removed by stating on the label that the brandy is bottled in Melbourne by the Defendant. The battle-axe is the Plaintiffs' distinctive trade mark, and it has not been adopted. There is no evidence of deception, and the differences are such as to prevent it : *Leather Cloth Company v. American Cloth Company* (y), *Woolam v. Ratcliff* (z). Any purchaser aware of the alleged difference between the Plaintiffs' cask and bottled brandy, and wishing to buy the bottled brandy, would examine the bottle, and see that the Defendant states the brandy to be of his own bottling, and that the spread eagle is substituted for the battle-axe. A purchaser unaware of the distinction, and merely wishing

(s) 1 L. R., Ch., Ap., 192.
(t) 1 H. & M., 447.
(v) 1 De G. J. & S., 185.
(w) 2 Dr. & Sm., 476.

(x) 6 De G. M. & G., 214.
(y) 33 L. J., Ch., 199.
(z) 1 H. & M., 259.

to buy *Hennessy's* brandy, would get what he wanted and would not be deceived.

No reply was called for.

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MR. JUSTICE MOLESWORTH:—

In this case an application is made to restrain the use of particular labels. The labels are, when compared one with the other, so dissimilar that nobody who thought of comparing them could be deceived. With regard to the battle-axe and the eagle, and also as to some small letters hardly readable from the opposite side of the bar of a public house, there are dissimilarities. But as to the shape and character of the letters "*Jas. Hennessy & Co.'s Cognac*," and the size and shape of the label and circumference of vine leaves, there is a striking similarity. There is no affidavit on behalf of the Defendant that these similarities are accidental, or that they were not done with the express design of the one article being mistaken for the other; and I think, according to the authorities, that an intention to produce a mistake is sufficient to warrant the interference of this Court by injunction. According to the authorities also, it is not necessary that the intention should be to deceive persons who carefully examine. It is enough that there are a class of customers who examine so carelessly that they would be deceived by the resemblance between the two. Very likely Messrs. *White* do not attempt to impose upon anybody with whom they are in direct privity, but it is enough to sustain an injunction if the labels are framed with the intention of being ultimately employed so as to produce deception; and I think so much studious correspondence would not have occurred without that object.

The defence is that the article sold is really *Hennessy & Co.'s Cognac* brandy. Then comes a point not raised in any

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of the previous cases, and which I have to deal with on first impression, whether a manufacturer may not manufacture first, second and third class articles, and whether he has not a right to be protected against purchasers of the second class article, passing that off as though it was the first class article. There is an affidavit here that the brandy bottled by the Plaintiffs is of a certain age, and that something is put into it as a trade secret, and that is not answered. There is also a matter which strikes very strongly upon my mind, as shewing an intention to produce an impression upon the purchasers of this article, that it is *Hennessy's* bottled brandy, namely, the brand on the inside of the corks. We all know that this is looked upon by persons drinking different articles, as very strong evidence that the article is actually bottled by the person whose name is upon the cork. It is very common with Champagne and other wines, to look at the brand on the cork as a kind of identification of the manufacturer having bottled it. I think a new feature which has not been present in any other case, and is therefore not touched by the language of the other cases, is one which I ought to act upon here; that is, that the makers of articles of different qualities are entitled to brand their best article in a particular way, to shew the superior value they put upon it. If persons wish to purchase *Hennessy's* Cognac and bottle it, and sell it as such, let them do so; but let them do it upon their own credit as the bottlers, asserting that it is *Hennessy's* Cognac. I should bow of course to the decision in *Farina v. Silverlock*, but I should, except as against such high authority, be very much disposed to question the opinion expressed in that case. I put this case upon the particular ground that an article of *Hennessy & Co.'s* manufacture of a higher quality has had a particular mark used for it, and that the Defendant's brand is an attempt to deceive, probably not the direct purchaser of the article, but the ultimate consumer. The costs of this motion will be costs in the cause.

From this judgment the Defendant now appealed to the full Court (a).

Mr. *Fellows*, Mr. *Lawes*, and Mr. *Webb* for the Appellant.

Mr. *J. W. Stephen*, Mr. *T. A'Beckett*, and Mr. *Cock* for the Respondents.

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The following authorities were referred to in addition to the cases cited in the Court below:—*Williams v. Osborne* (b), *Taylor v. Taylor* (c), *Burgess v. Hills* (d), *Cartier v. Carlisle* (e), *Moet v. Couston* (f).

Cur. adv. vult.

THE CHIEF JUSTICE read the judgment of the Court as follows:—

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The Respondents are merchants trading in the distillation and manufacture of brandy, at Cognac in France, as "*Jas. Hennessy & Co.*" Large consignments of their brandy, both in bulk and bottled, were annually sent to their agents in Victoria—that in bottle being of a superior quality to that in bulk, and containing a flavouring put only into it. This flavouring was the firm's, or a trade secret. On each bottle there was a rectangular label, bearing the name of the firm in gold letters on a white ground, encircled with a wreath of vine-leaves and grapes, and surmounted with an arm bearing a battle-axe, all in gold. The corks, as well as a metal capsule placed on each bottle, also bore the name of the firm. The Appellant bottled and sold in Melbourne the Respondents' bulk brandy—the bottles, labels, corks, and capsules corresponding in most respects with those of the Respondents. There were some trifling dissimilarities,

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|---|--------------------------|
| (a) <i>Coram, Stowell, C. J., Barry, J., and Williams, J.</i> | |
| (b) 13 L. T., N.S., 498. | (d) 26 Beav., 244. |
| (c) 10 Hare, 475; S. C., | (e) 81 <i>Ib.</i> , 292. |
| 23 L. J., Chy., 225. | (f) 33 <i>Ib.</i> , 578. |

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the principal being the substitution of a spread eagle for the arm and battle-axe, the addition of the letter "s" after the firm's name in exactly the same letters; and in small characters at the bottom of the label the words "Bottled by *White & Co.*" The suit was instituted for an injunction and account; and on application for the injunction, the answering affidavits admitted substantially these facts—one of the deponents asserting that the brandy bottled by the Appellant was equal in quality to that bottled by the Respondents. An order was made granting the injunction, and against that order the present appeal was made.

Had the brandy bottled by the Appellant not been manufactured by the Respondents, he must, we think, have been compelled to admit he was infringing the established rule, recognised in the judgment in *Perry v. Truefit* (g)—"That a man is not to sell his own goods under the pretence that they are the goods of another."—"He cannot, therefore," it is observed in the same judgment, "be allowed to use names, marks, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person." It may not unfairly be presumed that the Appellant intended that to which his acts reasonably point, and we think that the obvious effects of those acts, whatever may have been the real intention, was to lead the unwary and those not fully acquainted with the marks used by the Respondents, into the belief that they were purchasing brandy made and bottled by them (the Respondents). The general similarity in almost all the details is so marked, and the special differences are on matters so trifling and insignificant, as to leave no doubt in our opinion as to what their effect would have been. We were invited to consider the arm and battle-axe on the Respondents' label as their trade mark, and because it was not adopted by the

Appellant to disregard all other matters as of no importance; but this is precisely the course which the Courts have carefully avoided—namely, selecting any one or more matters, either of resemblance or difference, and considering them essential, or attempting to define *à priori* what might or might not constitute an improper imitation by one person of the manufacture of another. For such a course would manifestly offer inducements for fraud; persons so disposed would then endeavour to avoid the one or more objectionable points, but yet so present the particular article for sale as to impose on the unwary, who accept as sufficient proof of genuineness a resemblance in the main, without closely examining details. An imitation of the trade mark would, no doubt, render the case still stronger against the Appellant; but the mere substitution of one mark for another, both being in the same position and of the same colour, does not, in our opinion, neutralise the effect of all the other points of resemblance.

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The Appellant contended, however, that as he sold an article manufactured by the Respondents, he was at liberty to subdivide it, make it up in any mode he pleased, and place on the parcels so divided labels representing them to be the Respondents' manufacture. For this position he relied not a little on the decision on appeal in *Farina v. Silverlock*. This, no doubt, at first sight, presents a difficulty. The ruling in the case referred to must not, however, be exaggerated. Labels, the printing of which formed the subject matter of that suit, might in that case, it was held, have been used for a lawful purpose—the replacing, for example, by new and fresh labels those old and worn out; and the injunction to restrain the use of such labels was refused until the case had been tried at law. There are expressions, too, from which it might apparently be inferred that the Lord Chancellor thought it possible that articles manufactured by one person might be purchased in large parcels, and afterwards subdivided into

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 ———
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smaller, and the labels of the original manufacturer placed on them, without any fraud or imposition being practised.

Assuming the decision in that case warrants such a conclusion being drawn, there is this special and material distinction between the circumstances of the two cases—that cited and the present. In the former there was only one article, and the same which had been contained in the large parcels was placed in smaller. Eau de Cologne contained in quart was put into pint bottles. In the latter—the present case—there are two articles differing one from the other. The manufacturer himself has made them up in two different parcels, and the purchaser has taken the articles from the larger parcels, and put into the smaller another and different article than that which the manufacturer was in the habit of so placing. If a brandy different from that which the manufacturer bottled, is put into bottles and sold as the manufacturer's bottled brandy, the fact that it is the manufacturer's bulk brandy does not make the sale less an imposition. The sale of the Respondents' brandy, as they bottle it, may be more profitable to them than the sale of their brandy in bulk. They ought not to be deprived of the larger source of profit. The very supposed resemblance between the two brandies renders the substitution of the one for the other more easily practised. We concur in the observation that they, not the Appellants, are to decide which is to be sold in bulk and which in bottle.

We can see no sound distinction between the substitution of a wholly different article for that manufactured by the Respondents, and the substituting one article manufactured and sold by them in a particular kind of parcel for another and different article, also manufactured and sold by them in a different kind of parcel. *Ceteris paribus*, the sale of the one may be as great an injury to the manufacturers as the sale of the other. If the one should be

restrained, so should the other. We think the effect of the Appellant's acts was to induce purchasers to believe they were buying not merely the Respondents' brandy, but their bottled brandy. We concur in the order pronounced by the Court, and think that the appeal should be dismissed. We see no sufficient reason why costs should not be awarded to the successful litigant.

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Appeal dismissed with costs.

HENNESSY v. HOGAN.

THIS case was similar to the last, except that the name of the Plaintiffs was not used on the Defendant's corks and capsules, and that the Defendant used the device of an arm holding a dart, instead of the Plaintiffs' device of the arm and battle-axe.

Mr. J. W. Stephen, Mr. T. A'Beckett, and Mr. Cock, for the Plaintiffs, now, pending the appeal to the full Court in the last case, moved for an injunction in the same terms as in that case.

Mr. Webb for the Defendant. The decision in *Hennessy v. White* proceeded, to a great extent, upon the use of the Plaintiffs' names upon the corks, as being a representation that they were the bottlers; but in this case there is no such brand on the corks; and the labels bearing the intimation "Bottled by Hogan, Money & Co.," in bold type,

April 29.
H. & Co.,
brandy manu-
facturers,
exported to
Victoria their
brandy in
bulk and also
in bottle, the
latter being of
superior
quality to, and
with a distinc-
tive flavoring
from, the
former.
H., M. & Co.
purchased
H. & Co.'s
bulk brandy,
and bottled
and sold it in
bottles with
labels colour-
ably imitating
those of H. &
Co.'s bottled
brandy; but
H. & Co.'s

corks and capsules were not imitated, and the labels had on them, in comparatively bold type, "Bottled by H., M. & Co."

Held, per *Molesworth J.*, that although there was no imitation of the cork, and a more palpable writing of the bottlers', as distinguished from the makers', name, than in *Hennessy v. White*, yet the case was not materially distinguishable from that case, and injunction granted.

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 —
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is sufficient to prevent deception. There has been here no application to the Defendant to discontinue the alleged imitation, and in the absence of that the Court will not grant an injunction: *Williams v. Osborne* (h).

MR. JUSTICE MOLESWORTH:—

I have doubted whether I ought to dispose of this case at present, or reserve my decision until after the Equity appeals, now coming on, in which a parallel decision of mine (j) will be reviewed. But, I believe on the whole, it will be more convenient for the ultimate determination of this case, and the ultimate saving of costs to the parties, that I should act upon the same impression upon which I acted in the former case; namely, that if a label is used apparently very much resembling the trade mark of another firm, and the person who uses it does not say that the resemblance is accidental, he is to be taken as having admitted that the resemblance is intentional, and it follows from that, that it is intended to be used for a purpose which is inconsistent with the rights of the Plaintiff. In this case the Defendant swears that his imitation is not fraudulent, and very likely according to his views of the rights of the parties, there is nothing fraudulent in what he is doing. But he is charged with issuing bottles having a label imitated from that of the Plaintiffs' to a considerable extent. It is not necessary that the imitation should be such as to deceive a person accurately scrutinizing it. It is sufficient if it is done with the intention of deceiving any class of purchasers, or to enable sub-vendees to make the article in question more attractive.

As to the case of *Farina v. Silverlock*, if it were in point, I should have to decide between the decision of a Vice Chancellor who is now Lord Chancellor, and the decision of the then Lord Chancellor over-ruling that of the Vice

(h) 13 L. T., N.S., 498.

(j) *Vide* last case.

Chancellor. I have not that difficulty, but I would be rather disposed to adopt the view of the present Lord Chancellor that the offence of using a trade mark is not limited to using it to pass a spurious article. Suppose a man went to Messrs. *Hennessy* and purchased 1,000 bottles of brandy in bulk, and said "Have you any objection to give me 1,000 of your labels that I may put them on the brandy I am now buying?" If he was a very valuable customer, perhaps they would submit to that, but if he was a customer they did not care very much about, they would say "Why are we to give you 1,000 labels? You may be getting a large quantity of brandy more than you have purchased from us and putting our labels, or similar labels, on it, and why are we to be put upon an enquiry whether the liquor sold is, or whether the labels you are using are, genuine? We will not subject ourselves to the inconvenience and hardship which might result from your doing so. If you want 1,000 bottles with our labels, we will charge you more for them than if you buy the same article without our label, because people will give a higher price for an article with our brand, than they will for the same article without it, as being more readily saleable." That I think shews the extreme injustice of the view apparently deducible from that case, that anybody has a right to use a man's trade mark, provided he puts it upon his manufacture. In that case, I observe, it was sworn that it had become very common for persons to put fresh labels upon the bottles; it does not go on to say that the Plaintiffs had ever sanctioned that, but it says that they were aware of the practice, and so far there is an ingredient in that case which is wanted in the present.

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Upon the whole, though I feel considerable doubt about the case, I think I shall do better to deal with it as I did with the other, for I do not think the present case is materially distinguishable. The imitation

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is less decided; there is not the imitation of the cork, and there is a more palpable writing of the bottler's, as distinguished from the makers', name, than in the last case, but I think upon the whole, I should follow the same course. I was somewhat shaken by the case of *Williams v. Osborne* in the *Law Times*; but the *Law Times* does not bear the same stamp of authenticity as the contemporaneous reports. It is not, I presume, revised by the judges in the same way as other reports; moreover, it is not a decision but only a dictum, and is certainly contrary to the current of authorities, which is, that a demand before suit is merely an ingredient considered by the Court in dealing with costs. I think in this case I should follow the course I did in the other, and grant the injunction; costs to be costs in the cause.

THE MELBOURNE AND HOBSON'S BAY UNITED
RAILWAY COMPANY v. THE MAYOR, &c., OF
THE BOROUGH OF PRAHRAN.

April 16.
May 12, 13.
September 2.
October 1.

By the Act
No. 269,
sec. 31, it was
provided

that the *H. B. Ry. Co.* should not be *obliged* to complete, maintain, or use, a piece of railway called the "loop-line," and if not completed, maintained, and used, within two years, the Crown land on which a part of it was constructed should revert to the Crown, and the Company might sell the purchased land, on which the remainder had been constructed. The Company completed and used for one purpose only, but not for general traffic, the portion of the loop-line constructed on private land, but no portion of that constructed on Crown land. The portion used crossed a public street on a level under a power in the Act authorising the construction of the whole line. The Municipal authorities threatened to remove the rails and gates at the level crossing as an obstruction to the thoroughfare, not under the circumstances warranted by the Act. On bill by the Company to restrain such removal,

MOTION for injunction to restrain the Borough Council of Prahran from removing the Plaintiffs' rails and gates from Union-street.

Held, by the full Court, affirming *Molesworth J.*, that the option given to the Company applied to the whole loop-line, and was to be exercised or not as regarded the whole; and that the Company having acted as it did, must be taken to have abandoned the loop-line altogether; and motion for injunction refused.

Motion for leave to appeal to Privy Council from order refusing motion for injunction, refused with costs.

By Act 21 Vic., No. 42, the Brighton Railway Company were authorised to construct a line from St. Kilda to Brighton. Part of the line between St. Kilda and Chapel-street, known as the loop-line, ran across Union-street, a public highway in the Borough of Prahran. The loop-line was constructed from St. Kilda to Hoddle-street on land granted by the Crown; and from Hoddle-street to Chapel-street on purchased land, which was intersected by Union-street, at which there was a level crossing. The Brighton Railway Company were by Act No. 269 authorised to sell their undertaking. At the time of the passing of this Act, the loop-line was unused and out of repair; and by section 31 it was provided that, in the event of the Plaintiffs purchasing the undertaking of the Brighton Company, they should not be obliged to complete, maintain, or use the loop-line, and that if the loop-line should not be completed, maintained, and used within two years from the passing of the Act such part of the land on which it had been constructed as had been granted by the Crown should revert to Her Majesty, and that it should be lawful for the Plaintiffs to sell the remaining part of the land.

The Plaintiffs did not complete or use the whole of the loop-line within the two years, but used the portion constructed on purchased land, and in so doing crossed Union-street, which intersected it. This portion of the loop-line was not used for any passenger traffic, but for carrying stone and ballast, which was discharged by shoots put up at Hoddle-street, and as a siding for carriages. The Defendants objected to the Plaintiffs running across Union-street, and gave notice of their intention to remove the rails and gates.

The bill stated the above facts, and prayed an injunction to restrain the threatened interference. As to the consequences of the threatened interference, the bill stated "that the interruption to the use of the railway threatened

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by the Defendants would occasion loss to the Plaintiffs for which no adequate remedy could be obtained at law, and would lessen the safety and convenience of passengers travelling by the railway."

Mr. J. W. Stephen, Mr. Holroyd, and Mr. T. A'Beckett for the motion. The Plaintiffs are, by section 31 of the Act No. 269, relieved from the obligation of maintaining the loop-line, but they are not deprived of any of their statutory powers. The right to run across Union street has been expressly given by statute, and cannot be taken away by implication. The Plaintiffs' remaining powers were intended to be modified according to the extent of line which the Company retained, in exercise of the option given to abandon a part. The Plaintiffs were not obliged to abandon all the loop-line or none. They are allowed to retain lands on which part of the loop-line was made, and to retain it as a railway. The power to cross Union-street is necessary to the proper use of the portion retained, which without such power would be worthless. This is a proper case for injunction, as the Council are acting in excess of their statutory powers, and the threatened injury to the Company and the public cannot be compensated by damages at law. *Frewin v. Lewis* (k); *London and North-Western Railway Company v. Lancashire and Yorkshire Railway Company* (l).

Mr. Higinbotham and Mr. Webb for the Defendants. The power to cross Union-street was given in consideration of the advantage to be gained by the Company running their line from St. Kilda to Brighton, and was correlative to their obligations to do so. When the obligation ceased the power ceased with it. This privilege of abandoning a portion of the line was only available as a whole; the Plaintiffs could not abandon a part and retain a part, with the powers which were given for the use of the line as a

(k) 4 M. & Cr., 249.

(l) L. R., 4 Eq., 174.

whole; *Cohen v. Wilkinson (m)*. We do not object to the Plaintiffs keeping their purchased land and using it as they please, but we contend that their statutory power of running across Union-street is determined, and that they have no other power under which they are entitled to cross it, and exclude the public while doing so. As to the injury, the threatened act would be, if illegal, a mere trespass remediable at law. It appears that the only goods traffic which would be interrupted is for one contractor, and damages would be a sufficient remedy. The injury to public safety is not shown, as the part of the line used for a siding does not cross Union-street.

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Mr. J. W. Stephen in reply.

MR. JUSTICE MOLESWORTH :—

Judgment.

In this case there had been several previous Railway Companies. The Railway which I have at present to consider is one running from Melbourne to Windsor. There was another Railway running from St. Kilda to Brighton, forming a junction at Prahran or Windsor with the line from Melbourne to Windsor, but being itself in fact one entire line from St. Kilda to Brighton. These were distinct Companies, with distinct rights and obligations; that as to the Brighton Company being one entire obligation to run from St. Kilda to Brighton, as to which they were legally compellable to maintain the Railway entire from St. Kilda to Brighton. In fact the Railway had been completed from St. Kilda to Brighton, but the portion between St. Kilda and Windsor had fallen into disuse and was not in working order, so that that Company was in default as to so much of the line.

An Act No. 269 was then obtained, partly for the benefit of the public, and partly for the convenience of

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the several Companies, as to which the ordinary principle is applicable, that all ambiguities as between the Companies and the public are to be taken most strongly against the Company. Clause 29 of the Act transfers all the property and rights of the two Companies with which we are now dealing, to the United Company, and then comes the 31st section relieving the amalgamated Company from the obligation under which the St. Kilda and Brighton Railway Company had previously labored, of maintaining the whole line from St. Kilda to Brighton. "It shall not be obligatory on the said United Company to complete, maintain, or use the portion of the St. Kilda and Brighton Railway lying between the said St Kilda station and the Chapel Street station, but in case the said United Company shall not within the period of two years from the passing of this Act complete, maintain, and use the said portions of the said Railway," &c. It impliedly gives them an option to do so or not. It does not expressly do so, but it can in no way, I think, be taken to give them rights, or an option, as to a portion of this, which was not to be exercised over the entire. They had been relieved previously from the obligations over the entire interval between Brighton and St. Kilda, by enabling them to continue to use it as to a portion only, abandoning another portion. But I do not think that option could be extended further, and that as to the fraction of the line between St. Kilda and Windsor, the Company would be at liberty to use what they liked, and abandon what they liked; and retain their Parliamentary powers and privileges over one portion of that fraction, whilst they abandoned another portion. It then goes on to say, assuming they do not exercise the option of repairing that portion within two years, "the land granted by the Crown shall revert to Her Majesty," and then comes another provision, that "it shall be lawful for the said United Company to sell the remaining part of the land forming the said portion of the said Railway, and to execute all necessary convey-

ances and assurances." Under this clause the Company were left the rights of property which they before had, as to the land which they had purchased from private proprietors. They might keep it and use it. I do not think the words "it shall be lawful for them to sell," are to be read as binding them to sell, but are introduced to enable them to make title to a purchaser, which otherwise might be doubtful. But the question here is whether they might retain that portion of land and treat it as private property; and retain with reference to the road crossed, the powers of the Act under which the Railway was constructed. As to that, I think the clause gives the Company a great deal, but it must be on the ordinary principle read more strongly against the Company than for them, as between them and the public. The clause gives them an indulgence, virtually suspending their obligations for a couple of years, and giving them an option within that two years to resume the rights, powers, and privileges of the original Brighton Railway Company. But in case they did not exercise that option within the two years, it gave them no option to take up so much of the line as they thought fit, and use the remainder. They should either use altogether, or abandon altogether, and in the way they have acted, I think they must be taken to have abandoned it altogether.

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Then the way they are using the fraction of this portion of the line at present, is not for the furtherance of proper railway purposes at all. They are dealing with a single customer only, for whom they are conveying stone across the road in question. They are not using it for passenger traffic at all. I should hold differently if the case were now as to a portion of what was undoubted railway, say between Melbourne and Prahran. If the Company totally ceased to run their carriages and traffic along that, and the Corporation were attempting to break up their railway, I should then hold

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that the Corporation should be restrained ; because though the *de facto* use of the railway had ceased, the powers and liabilities of the Railway Company with respect to that portion continued, and they might resume working at any time, and might be forced to do so. But this Act has exempted them from all liability to use this portion of the line for railway purposes. I think therefore, their not using the railway *de facto*, and being under no obligation to use it as a railway, the powers and privileges with respect to it as a railway have ceased.

With reference also to the manner in which they are at most using it, I would doubt very much whether their case presents such materials as would ordinarily induce the Court to proceed by injunction. As to irreparable damage: if the Council break up the rails and stop the present trucks passing to and fro, and conveying stone, the damage would be easily ascertainable by an action at law. However long the Company was suspended in its operations ; whatever money they could have made during that time from Mr. *Chambers'* stone traffic, would be the amount of damages. There is no irreparable mischief beyond that ; and as to the danger to passengers, from the Company being stopped in using this ground as a siding for carriages and 'so forth, I think that is too remote to be talked of as supporting an injunction. This lie-by ground may be some facility to the Company in carrying on their traffic ; but it cannot be said that with reasonable care on their part they could not prevent accidents without having this lie-by.

I am against the Company, according to my present views, upon their rights as under the Act ; and against the motion also with reference to there being neither irreparable damage, nor probable danger to the lives or limbs of the passengers using the railway, from the Company being deprived of this crossing of the road in question. I refuse the motion. Costs to be costs in the cause.

From this judgment the Plaintiffs now appealed to the full Court (n).

Mr. J. W. Stephen, Mr. Fellows, Mr. Holroyd, and Mr. T. A'Beckett for the Appellants.

Mr. Higinbotham and Mr. Webb for the Respondents.

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May 12, 13.

Appeal.

Cur. adv. vult.

THE CHIEF JUSTICE read the judgment of the Court as follows:—

Judgment on Appeal.

September 2

The appeal in this case depends on the proper construction to be placed on the Act 28 Vic., No. 269, section 31, the Appellants contending that they are entitled to retain all their privileges as regards a portion of the line between the St. Kilda and Chapel-street stations, although they have elected to give up the remainder. The clause in question enacts that on the vesting of the undertaking and property of the St. Kilda and Brighton Railway Company in the Appellants, the statutes therein specified relating to that Company should, with certain exceptions, be applicable to the Appellants, a proviso declaring that it should not be obligatory on them to complete, maintain, or use the portion of the railway lying between the two stations; but in case of their not doing so within two years, the land granted by the Crown forming part of the line should revert, and the purchased land forming the remainder might be sold, and the necessary conveyances executed. There is no express declaration, it is said, of a forfeiture of the Appellants' rights in the event of their not completing, maintaining, or using this portion; and there can be no repeal by implication of the previous parts of the enactment, as such a repeal is prohibited by the Act

(n) *Coram, Stowell, C.J., Barry, J., and Williams, J.*

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29 Vic., No. 290. We think that the necessity for inserting this proviso conveys the presumption that, but for it, the Appellants would have been obliged to complete, maintain, and use the portion of the line between these stations. They are by it relieved from so doing if they desire—their option being exercised within two years. The words used leave no doubt, in our opinion, that this option applied to the whole of the line between the stations, and that it must be exercised or not exercised as regards that whole, and not for any part thereof only. There are no express words that the rights of the Appellants were to cease as regards all, if their obligations ceased also; but we think that by reasonable and necessary intendment the ceasing of the rights was to be co-extensive with the ceasing of the obligations. The proviso does not, however, stop there; all Crown lands forming part of the line—what proportion this part bore to the whole does not appear—were to revert if the line was not completed.

We need not consider the singular position of a railway line terminating at no station; stopping abruptly for no apparent reason but that the continuation had at one time been formed of Crown lands; and of no convenience to the general public, except to go to a point where Crown lands commenced and return again—for the proviso continues and enables the Company to sell all private lands forming the remainder of the line. It would have been unjust to the Appellants to have deprived them of the power of using for a railway lands purchased for that purpose, and not allow them the option of selling those lands, which would have thus lain useless on their hands. It may be more than questionable whether, having obtained lands compulsorily from the owners for one purpose, they could dispose of them and apply the proceeds as they pleased. This part of the proviso, therefore, seems to have been inserted as a measure of caution if not of necessity. But if the Appellants were not deprived of their

rights of running, it would have been equally unjust to the public to have allowed them to take lands for one purpose as a benefit to the public, then sell them or not at their option, and apply the proceeds for their own benefit solely.

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It has been urged that part of the purchased lands might be sold, and part retained to form a portion of the line; but there are no words in the proviso to warrant such a construction. In order to sustain it the Appellants should have been empowered to sell such parts of the purchased lands as they did not continue to use for the purposes of the line, and to continue so to use the remainder. Nor, as regards this point, can we discover any sound distinction between Crown lands and purchased lands. The advantages derived by the public from the railway justifies a grant of part of the public domain for that purpose; the consideration ceasing, the grant should cease also, and the land revert. But if, notwithstanding this proviso, the Appellants retain the power of using any part of this line between the stations as a public highway, why should it be restricted to purchased lands? The convenience to the public would be the same of whatever kind of land the line was formed; the consideration *pro tanto* would be the same, and any Crown lands so used ought not in justice to revert.

The declaration that lands granted by the Crown forming a part of this portion of the line were to revert if the Company elected not to complete, maintain, or use it, was by very plain and obvious intendment a declaration that the rights of the Company as regards those lands were to cease; and we think that the declaration that lands forming the remainder of this portion, purchased for the purposes of the railway, might, on the like election, be sold, was by fair and reasonable intendment a declaration that the rights of the company were to cease as regards

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*Judgment on
 Appeal.*

those lands also. We can discover no grounds to support the argument urged at the bar, that the Appellants were compelled to purchase the property of the St. Kilda and Brighton Railway Company.

We think the construction placed on this statute by the judgment already pronounced is the sound and correct interpretation of the enactment, and that such a construction does not make this proviso repeal by implication any Act "already in force"—that is, in force when the proviso itself was passed; it is merely the construction of one clause of a statute taken in connection with other clauses of the same statute, and does not affect any other enactment already in force; the Act 29 Vic., No. 290, does not in our opinion apply. We think the injunction was properly refused. The appeal will therefore be dismissed with costs.

Appeal dismissed, with costs.

*Leave to
 appeal to
 Privy Council.*
 October 1.

The Plaintiffs now moved (o) for leave to appeal to the Privy Council from the order refusing the injunction motion.

Mr. J. W. Stephen for the motion. The application is made under the Act 15 Vic., No. 10, and not under the Order in Council. The only question is, whether there can be an appeal under the circumstances, as the Act only allows appeals "from decisions by which the merits may be concluded." The merits here are concluded by the decision of the Court; for the Plaintiffs cannot succeed at the hearing, if the Court adhere to its present view of the law.

Mr. Higinbotham and Mr. Webb contra. The merits are not concluded by the decision on the injunction motion.

(o) Coram, Moleworth, J.

There is nothing to prevent the case going to a hearing; and from the decision of the Court then, the Plaintiffs can appeal. The Court will not give leave to appeal from an interlocutory judgment only. *Crooks v. Ormerod* (p); *Davis v. The Queen* (q).

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Mr. J. W. Stephen in reply.

MR. JUSTICE MOLESWORTH.—I think the meaning of the Act is, that before an appeal can be allowed, the Court must do something by which the rights of the parties may be concluded; not merely intimate an opinion upon an interlocutory application, which being applied to the case at the hearing would determine the rights of the parties. The Court must, I think, do some curial act which would determine the rights of the parties. I very much question whether, even if the parties gave their consent, an appeal could be allowed in this case. The Act is intended partly to save the Privy Council from the unreasonable trouble of being called on to deal with interlocutory decisions, and from giving judgments which would leave the parties the power to continue their litigation. The Order in Council allows a greater latitude in this respect than the Act. With very little expense and delay the Plaintiffs can set down the cause for hearing on bill and answer, and the decision of the Court will then be given, from which an appeal will lie.

Judgment.

Motion refused, with costs.

(p) *Ante*, Vol. III., L., 132.

(q) *Ante*, p. 125.

The Bill was subsequently (23rd December) dismissed for want of prosecution.

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March 1, 2, 24.

May 8, 10.

September 2.

BRUCE v. LIGAR.

B. and L. were partners in a station. *B.* died, having appointed *L.* and others his executors and trustees. *L.* failed to account for the partnership assets. In a suit by two of the trustees and the *c. q. t.* as Co-plaintiffs, against *L.* and a fourth trustee as Defendants, for an account of the partnership, and the removal of *L.* as a trustee,

Held, that *L.* was not entitled, prior to his removal from the trust, to have the entire accounts of the estate taken, but only an account of his own receipts and disbursements.

Admissions of a Defendant may be used as evidence of a case made by the bill, though not put in issue.

Papers of a testator, shewing rights of his executors as a class, against one of the executors individually, placed by such one executor in the hands of the solicitor to the executors, may, without breach of professional confidence, be produced by such solicitor as evidence for the Plaintiffs, in a suit by the other executors against the one who placed the papers in the solicitor's hands.

An application for a commission to examine witnesses should be regarded almost as of right, if made *bona fide*; but where a Defendant was served with the bill in the colony, and before leaving put in his answer, but left the colony after express notice from the Plaintiffs, that any application for a commission to examine him abroad would be opposed,

Held, that such Defendant was not entitled to a commission to examine him in England, as a witness on his own behalf.

THE bill in this suit was originally filed by Mrs. *Margaret Vans Agnew Bruce* and *Alexander Kennedy Smith*, two of the trustees of the will of *J. V. A. Bruce*, deceased, and the infant children of the late Mr. *Bruce*, against *Charles Whybrow Ligar* and *John Watson*, the other two trustees of the deceased's will.

The bill charged that in September, 1857, the Defendant *Ligar* applied for a license to depasture stock on a run in Otago, New Zealand, and that a license was granted to him in July, 1860, for fourteen years, from the 13th September, 1857. On 14th November, 1861, *Ligar* executed a deed by which he acknowledged having sold one-half of the station to the Defendant *Watson* for £3,000, the receipt of which he acknowledged; and on 18th November another covenant was added by endorsement, signed by *Ligar* and *Watson*, that, upon either of them wishing to sell his share, the other should have the first offer of it. The money, it was alleged, was paid by *Watson*, but really belonged to *J. V. A. Bruce*, and the half-share in the station was in reality purchased

for *Bruce* by *Watson*, who, on 20th December, 1861, executed a formal declaration of trust in *Bruce's* favour. *Bruce*, by his will dated 13th September, 1859, bequeathed all his real and personal estate to trustees and executors named, and died 5th April, 1863, leaving his widow, Mrs. *Bruce*, and the infant Plaintiffs, his children, the only persons beneficially entitled under his will. Probate of his will was obtained by *Ligar*, *Watson*, Mrs. *Bruce*, and *James Stoddart*. The latter gentleman subsequently died, and the Plaintiff, *A. K. Smith*, was appointed trustee of the will in his place. The bill alleged that *Ligar* made large profits out of the station, but never accounted for them to *Bruce* in his lifetime, nor to the executors since his decease. In 1864 *Ligar* sold the station to Messrs. *Brown* and *Stewart* for £10,691 13s. 2d., which was received by *Ligar*, who had not accounted for any of the purchase-money. As to *Watson*, it was alleged that he did not account to *Bruce* in his lifetime, nor after his death to the executors, for any money accruing due to the estate; and although well aware of the sale of the station by *Ligar*, never applied to him for his share, nor took any steps to compel him to pay part of the purchase-money. The bill also alleged that the Defendants sometimes denied that the sum of £3,000 was paid at all; and charged that if the same was not in fact paid, it was the then estimated value of the share of *Bruce* in the run and sheep, in which by a previous agreement between them, *Bruce* and *Ligar* became partners, *Bruce* having originally supplied the sheep to stock the run. The bill then averred that Plaintiffs had only recently discovered the default of the Defendants in respect to this matter, for the Defendants never made any entries, or caused any entries to be made, concerning the station or its proceeds in the books of account relating to *Bruce's* estate, and did not furnish to the other trustees any information whatever concerning the property; and the Plaintiffs submitted that, under the circumstance, Defendants had misconducted themselves in the office of trustees of the

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will, and ought to be removed therefrom. The prayer of the bill was that it might be declared that *Bruce* in his lifetime, and his estate after his death, was entitled to half the station; for an account of the profits made by *Ligar*; for payment by him and *Watson* of what was found due; and for their removal from being trustees of the will.

Ligar in his answer admitted the execution of the indenture of 14th November, 1861, and the covenant endorsed upon it, but denied that he had ever received £3,000, or any part of such sum, from *Watson* or any other person; denied that the run was the joint property of himself and *Bruce*; admitted having sold the station for £10,691, but submitted the account sales from the agents, which shewed that the net sum received was only £4,125 16s. 9d. The answer then made the following case—That about the year 1857 it was agreed between *Bruce* and *Ligar* that the former should supply 1,200 sheep for the station, and should afterwards supply 2,800 sheep, to the value altogether of £4,000, and that when he did so he should be entitled to half the station. *Bruce* never fulfilled his agreement, but only supplied 700 sheep, worth £700, and never contributed any further sheep or capital to the business. For these 700 sheep *Ligar* expressed his willingness now to account, and submitted that *Bruce* having wholly failed to carry out or complete, on his part, the proposed arrangements for a partnership, no partnership, in fact, ever existed. The answer then averred that the indenture of 14th November, and the declaration of trust indorsed thereon, were executed by the Defendants at the request of *Bruce*, for the purpose of enabling him to make use of the same in some way as a security or otherwise, and upon the express understanding and agreement between *Bruce* and *Ligar* that the same should be of no effect as between them unless and until *Bruce* paid to Defendant the £3,000, or contributed sheep or other stock of that value, neither of which did *Bruce* ever do; and submitted

that the deed was executed without consideration, and was not binding on *Ligar*. As to never having made any entry in the account books, *Ligar* admitted this by his answer, but said that the books were not kept by him but by *Stoddart*, *Smith*, and Mrs. *Bruce*; and that both *Stoddart*, *Watson*, and Mrs. *Bruce*, were well aware of all the circumstances connected with the deed of November, 1861. He therefore denied that the circumstances had only recently come to the Plaintiff's knowledge, and averred that neither *Bruce* in his lifetime, nor the Plaintiffs at any time until after the death of *Stoddart*, had made any claim to any interest in the station, and submitted the Plaintiffs were barred by laches and delay. He also denied that he had mis-conducted himself as a trustee; but expressed his willingness to be discharged, if properly indemnified and paid his costs.

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Watson, in his answer, agreed in the main with the statements made by *Ligar* as to the execution of the deed of November, 1861, and stated that he had never paid any money on account of it. He denied that he had mis-conducted himself; stated that he had devoted great attention to the management of the estate, for which Mrs. *Bruce* had expressed her gratitude; and intimated that his removal from being a trustee would be prejudicial to the estate.

After the answers had been delivered, Mrs. *Bruce*, one of the Plaintiffs, died. The bill was therefore amended, by inserting an averment of her death, having first made a will appointing the Co-plaintiff *Smith* her executor; and of probate having been obtained by *Smith*, and a prayer was added for the appointment of a new trustee in the place of Mrs. *Bruce*.

Prior to the taking of evidence, an application on behalf of the Defendant *Ligar*, who was an officer in the civil service of the colony, was made in chambers (r) for

(r) Coram, *Molesworth*, J.

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tion were to be treated as such in the cause.

tive, a plaintiff: *Jacob v. Lucas* (t), *Griffith v. Van Leythusen* (v), *Bill v. Cureton* (w). It was alleged in the bill as a reason for the delay, that she knew nothing of the action till very recently, but the evidence shewed that she was fully aware of it in 1864.

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Mr. J. W. Stephen and Mr. Holroyd for the Plaintiffs, *contra*. In the cases cited, breaches of trust had been committed. Here the bill is filed primarily against *Ligar* as a partner of *Bruce*, and not as a trustee. The case is not wholly proved against *Watson*, and we do not ask for payment from him.

Mr. Bunny, in reply upon this point, referred to *Skipton v. Paulins* (x), *Fowler v. Reynal* (y), and *Fussell v. Elwin* (z).

MR. JUSTICE MOLESWORTH.—The Plaintiffs in this case allege that *Ligar* had responsibility to the estate of *Bruce*; that he was himself an executor of *Bruce*; that the responsibility had not been enforced, and still existed. The bill prays that *Ligar* and *Watson* may be ordered to pay the amount of that responsibility. The meaning which the Plaintiffs' counsel now give to that prayer, is that it has reference only to *Watson's* character as trustee for *Bruce* in his lifetime. I have only to say that the case assumes that aspect. The bill avers that Mrs. *Bruce* was ignorant of the fact, with which *Watson* was conversant; and so far as the averments of the bill go, the case might proceed; for an ignorant trustee may join the *cestui que trust* in filing a bill against a trustee who has knowledge of the facts, and seek to make that trustee responsible. The evidence shows that there was not that ignorance in Mrs. *Bruce*, and

(t) 1 Beav., 436.
(v) 9 Hare, 85.
(w) 2 Myl. & K., 503.

(x) 4 Hare, 619.
(y) 2 De G. & Sm., 749.
(z) 7 Hare, 29.

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therefore the suit cannot be maintained in that aspect. At the present stage of the cause, however, I am not to anticipate what decree I shall make. *Watson*, as one of the executors, is a necessary party to the suit, and no suit could be instituted without making him a party, either Plaintiff or Defendant. I therefore think the cause may proceed; but I shall not make a decree which shall prejudice *Watson*, leaving unprejudiced other persons who should be equally liable with him.

Mr. *J. W. Stephen* and Mr. *Holroyd* for the Plaintiffs.—*Ligar* cannot get out of the solemn deed into which he entered in November, 1861, without giving a clear and satisfactory explanation. The theory he has set up, that the deed was executed to enable *Bruce* to obtain credit, is not supported by any evidence, documentary or otherwise. An appeal to the sympathies of the Court may be made on the ground that the Defendant has not been examined on commission; but the Defendant must have known before he left the colony that his own evidence was necessary in a case where not merely his pocket, but to some extent his character, was concerned. He might have consented to be examined *de bene esse* before he left the colony, even although this might have placed him at some disadvantage. The case as to *Watson*, we leave with the court. If no misconduct is proved against him, he need not be removed; but we ask for the appointment of a new trustee in the place of *Ligar*.

Mr. *Bunny* and Mr. *Webb* for the Defendant, *Ligar*.—The case comes before the Court under very peculiar circumstances. Some documents are found among the papers of the late Mr. *Bruce*; nothing is done with them for a long time, but at last a suit is instituted. The Plaintiffs produce a deed of 1861, and endeavour to explain it by another scrap of paper written in 1853. These are pieced together, not by the pleadings, but by counsel at the bar.

These documents were in existence for a considerable time in the lifetime of *Bruce*—were in his possession for three or four years—and yet he never made any claim upon *Ligar*. No explanation is now given of their history. The onus of explaining them, and of accounting for the delay that has taken place in preferring the claim, rests upon the Plaintiffs; it was not for Mr. *Ligar* to explain them further than he has done in his sworn answer. The suit, we submit, is wrongly framed. Whatever relief the children of *Bruce* might ask as *cestuis que trustent*, co-trustees equally negligent with *Watson* and *Ligar*—against whom a decree might, with equal propriety, be made—cannot be Co-plaintiffs. The trustees cannot be removed unless all the accounts are taken, and the Defendants receive a full indemnity, binding upon all parties—infant and adult. Yet the only account asked for here is about this particular station, and in that respect the bill is defective: *White v. Jackson* (a). [*Molesworth, J.*—Do you ask for full accounts; for if you do, I think you are entitled to them.] Yes. The Defendant is willing to retire from the trust on receiving an indemnity; but unless he receive that indemnity, he cannot be compelled to retire.

The case, as set out in the bill, is that £3,000 was paid by *Bruce* through *Watson* for the half-share in the station; but not the slightest attempt has been made to prove that statement; on the contrary, the only witness called—Mr. *Watson* himself—says that no money ever was paid. Then the Plaintiffs fall back upon the document of 22nd March, 1858, but this is not admissible, not being in issue. Had the bill set out this document as the equity on which the Plaintiffs relied, the Defendant would have had a different case to meet, and might have been prepared with evidence upon it; but the case now made, is wholly inconsistent with the case made by the bill, and the Plaintiffs are therefore not entitled to relief: *Mathers v. Green* (b), *Hawkins v.*

(a) 15 Beav., 191.

(b) 35 L. J., Chy., 1.

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Maltby (c), Montesquieu v. Sandys (d), Rawlins v. Lambert (e).
 The correspondence between *Ligar* and the trustees in 1864, and the minute authorising him to sell the station, were also improperly received in evidence. They are not in any part in issue, and were produced by the solicitor of the executors, who received them confidentially, and who therefore could not produce them against two of the executors: *Taylor on Evidence*, sec. 832, *Pearse v. Pearse (f)*, *Parkes v. Yeates (g)*.

These proceedings have been instituted about a stale claim, at a time when the Defendant was about to leave the colony, and could not, therefore, give his version orally of the transaction. It does not now lie with the Plaintiffs to taunt *Ligar* with not giving evidence, when they successfully opposed an application for a commission to take his evidence. The Plaintiffs rely on two opposite cases—one that £3,000 was paid in 1861 by *Watson* for *Bruce* to *Ligar*; the other, that there was a partnership previous to 1861, and that the certificate of 1858 proved it. Now the first branch of their case is wholly disproved—£3,000 never was paid, nor is there any evidence that *Bruce* ever stocked the run with sheep to that value.

The document of 22nd March, 1858, gave Mr. *Bruce* certain rights, conditional on his putting 1,200 sheep on the run; he never did put that number of sheep on it, but only 700. The Plaintiffs' claim is a stale one; and though its staleness might be no bar to recovery if the claim was clear, yet it is an element of great weight where the title is doubtful. *Bruce* made no demand in his lifetime; and the trustees did nothing for four years.

Under all the circumstances, we submit the Defendant is entitled to have an issue sent to a jury, whether he was a

(e) L. R. 3 Chy. App., 194.
 (d) 18 Ves., 802.
 (e) 1 J. & H., 458.

(f) 1 De G. & Sm., 12.
 (g) 12 J. B., Moore, 520.

partner with *Bruce* or not. He could then give his evidence, and the case would be more satisfactorily investigated than at present.

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Mr. *Atkins*, for the Defendant *Watson*, expressed his readiness to retire from the trust on being paid his costs; but submitted that the Plaintiffs had failed to prove anything against him.

Mr. *J. W. Stephen*, in reply, admitted that the case against *Watson* was not proved, but submitted that from the way he had acted he ought either to pay his own costs or get them from *Ligar*.

Our. adv. vult.

MR. JUSTICE MOLESWORTH:—

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The original bill was sealed 21st August, 1868, by Mrs. *Margaret V. A. Bruce*, the widow and an executrix and trustee of the will of Mr. *John V. A. Bruce*, Mr. *A. K. Smith*, a substituted trustee of the will, and the children of *John V. A. Bruce* beneficially entitled under it, against Messrs. *Ligar* and *Watson*, other executors and trustees of the will, seeking to establish the right of *John V. A. Bruce's* representatives to a moiety of a station and stock in New Zealand, against *Ligar* entitled to the other moiety; and the removal of the Defendants, and appointment of new trustees.

The Defendants answered separately. Afterwards, on 4th October, 1868, *Margaret V. A. Bruce* died, having appointed *A. K. Smith* her executor, and the suit was continued by amended bill by *A. K. Smith* and others, varying the prayer by seeking a new trustee in her place also.

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Ligar, about 30th September, 1857, applied for a depasturing license for certain Crown Lands in the province of Otago, New Zealand, and obtained possession of it, and thenceforth up to 1864, through his agents there, remained in the occupation of it. The deceased *Bruce*, about 1858, put some sheep on it. On the 22nd March, 1858, *Ligar* in Melbourne, signed a paper—"This is to certify that I surrender to *J. V. A. Bruce* one-half interest in any runs which may now stand in my name in the province of Otago, in New Zealand, on condition of receiving one-half interest in the sheep which the said *J. V. A. Bruce* paid for to *James Macandrew* twelve hundred pounds." On the 17th July, 1860, a depasturing license was issued to *Ligar* by the Chief Commissioner of Crown Lands, New Zealand, for fourteen years, from 13th September, 1857, as a compliance with his application. By an indenture, 14th November, 1861, between *Ligar* of the one part, and *Watson* of the other, reciting the depasturing license, and that *Ligar* was in possession under it of the run, and had a number of sheep of all ages belonging to him depasturing thereon, and had contracted with *Watson* to sell him for £3,000 an undivided moiety of all the interest of him (*Ligar*) in the run and sheep, it was witnessed that, in consideration of £3,000 acknowledged to be paid by *Watson* to *Ligar*, *Ligar* assigned the said moiety to *Watson*. This deed has a receipt for £3,000 indorsed, but no money was actually paid. Four days afterwards a memorandum of covenant under seal was indorsed upon this, providing, as between *Ligar* and *Watson*, that if either, or his representative, were disposed to sell his moiety, the other should have the first offer; and providing for a value. On the 20th December, 1861, *Watson* signed and sealed a declaration of trust indorsed on the same deed, 14th November, 1861, stating that the £3,000 was the proper money of *Bruce*, and the moiety of the run and sheep was purchased by him at the request and on behalf of *Bruce*, disclaiming all interest in himself,

and covenanting to transfer according to the direction of *Bruce*. *Bruce* died in April, 1863, having by his will appointed *Margaret V. A. Bruce, Ligar, Watson*, and *Mr. Stoddart*, and *Mr. Taylor* (who disclaimed) his executrix, executors, and trustees. On 30th April, 1863, probate was granted to *Margaret V. A. Bruce, Watson, and Stoddart*, reserving the right of *Ligar*, who took probate on 6th October, 1864; but in the interval, about 10th August, 1864, *Ligar* sold the run, &c., for £10,691 13s. 2d., paid part cash part bills, payable in one or two years, and received ultimately all the purchase money. *Stoddart* appears to have been the most active of the executors in the management of the affairs of *Bruce*, and died 12th June, 1867. After his death, this claim against *Ligar* was made by *Margaret V. A. Bruce* and *Smith*.

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The bill alleges—according to the deed—*Ligar* to have been in sole ownership, 14th November, 1861, and to have sold a moiety for £3,000 actually paid, which is untrue; but it makes an alternative case, charging that the sum of £3,000 was the then estimated value of the share of *Bruce* in the run and sheep, in which, by a previous agreement between them, *Bruce* and *Ligar* had become partners, *Bruce* having originally supplied the sheep to stock the run. At law, the recitals of the deed 14th November, 1861, would operate as an estoppel; not in equity, if they, being untrue, led to unjust results; but if the relations of *Bruce* and *Ligar* were deliberately fixed between them, to be thenceforth as entitled to the run and sheep in equal shares, by a bargain sustainable in equity, it is immaterial whether the recitals are true or false. It is not uncommon to effectuate arrangements based on other considerations, by untrue recitals of pecuniary payments, to shorten deeds, and simplify apparent title for dealings with strangers. I think the Plaintiffs were entitled to enforce rights as settled by the deeds 1861, and rather think that *Ligar* could not resist them without

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a cross bill ; but at all events the Plaintiffs might rely on either alternative of the alleged consideration, and I think, between them and the case set up by the Defendant *Ligar*, that they have established the second consideration.

The case of *Ligar* is that, in 1857, *Bruce* agreed with him to supply in that year for the run 1,200 sheep, or thereabouts, to the value of £1,200, and should afterwards supply 2,800 sheep more, value £2,800—making in all 4,000—and that thenceforth they should be equally interested in the run and sheep, and be partners; but that *Bruce* never fulfilled his part of the agreement although requested, and supplied a small number of sheep, not exceeding 700, of less value; that he himself brought in many more sheep; that he was always ready and willing and offered to account with the Plaintiffs for the value of the 700 sheep, but always denied a partnership. He denies any agreement before November, 1861, for a partnership between *Bruce* and him, and he says that the indenture of 14th November, 1861, and the declaration of trust endorsed, were executed at the request of *Bruce* for the purpose of enabling him to make use of the same in some way, as a security or otherwise, and upon the express agreement and understanding that the same should be of no effect as between them, unless and until *Bruce* or *Watson* paid the £3,000 to him, or contributed sheep of that value to the business. These alternatives are inconsistent; a contribution to the business should be double the value of a payment to *Ligar*.

Ligar did not give evidence to support his case. An application was made to me 1st December, 1868, for a commission to examine him as a witness for himself, which I refused. By consent of counsel on both sides, the affidavits of *Alfred Brooks Malleson* and *John Wilks*, then used, are to be entered as evidence. By them it appeared

that the bill was delivered 24th August, 1868; that the Plaintiffs' solicitors wrote to *Ligar's* on the 20th August that their clients would not consent to his leaving the colony, until he had given an undertaking, not to apply or seek for a commission, to have his evidence taken out of it; that their clients (trustees) had no right to incur a responsibility, by allowing the matter to stand over until his return; and by a similar letter of the 1st September, 1868, the Plaintiffs' solicitors stated that they would oppose, by every means in their power, any application that might be made for a commission to examine him out of the colony, and that his solicitors had better, therefore, take what steps they might consider necessary prior to his departure. *Ligar* sailed for England, 12th or 13th September, and his answer was delivered 14th September. Since parties have been enabled to become witnesses for themselves, applications for commissions to examine them at a distance, have been too often used for purposes of unfair delay, and should be regarded very suspiciously. It has been argued that it would be a great hardship to *Ligar* to disclose his case at that stage of the proceedings upon an examination *de bene esse*. I do not see that; examination by commission generally precedes the taking of evidence. The materials for preparing *Ligar's* answer would be materials for his examination. It might be an inconvenience for him, in the hurry of departure, to find time to be examined; but it would be a far greater hardship to the other side to be subject to the delay and expense of a commission, and the inconvenience of arranging an effective cross-examination at a distance. My refusal of the commission was not appealed from, and I think I should now, in the main, treat *Ligar* as one who has not given evidence to support a case, which he could, if it was true.

There is no evidence that *Ligar* ever put a sheep on the station. The first documentary evidence there is, that of

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22nd March, 1858, shews that *Bruce* had paid £1,200 for sheep intended for the station, and was therefore given a moiety of the station, as the price of a moiety of the sheep. The run was bought for £38 5s., at a rent of £8 18s., so that, unless it had increased strangely in value, *Ligar* seems to have made a good bargain; and the sum of £4,000 as value, would appear very improbable.

This document has been objected to as not put in issue. I think it sufficiently in issue by the assertion that, by a previous agreement, *Bruce* and *Ligar* had become partners. It came in no way by surprise upon *Ligar*, as he was sent a copy of it by Plaintiffs' solicitors (31st July, 1868), as affording evidence upon the question in discussion, inconsistent with some explanation he had offered. I have always held that admissions of a party may be used as evidence of a case made, though not put in issue. In *Goodman v. Boulton* (*h*), I refused to receive the statement of a settlor about making a settlement at one time, of his intent to defeat creditors, to impugn another settlement, as against those deriving under the other settlement, because the statement was not in issue; and the full Court, on appeal, reversed my decision, holding the statement admissible.

Another objection has been made to the reception of this document, that its production is a breach of professional confidence by the Plaintiffs' solicitor, Mr. *Malleson*. His firm was employed by the acting executrix and the executors and trustees, *Margaret V. A. Bruce*, the two Defendants, and *Stoddart*; and this document with other documents put into their hands as solicitors for the estate, should have been in the hands of *Bruce* when he died, and there is no evidence that it was ever especially in the hands of *Ligar* as an executor. As he was the last to take probate, it was probably in the hands of some other before that time, and never passed from him to the solicitors. But, taking it that

(*h*) *Ante*, Vol. V., Eq.

he had got it into his hands, and handed this paper, shewing rights of the executors as a class representing *Bruce*, against him individually, to solicitors employed by all, surely all confidence or right of secrecy for him was terminated. The document and its contents were to be read by all, used by all, or as a duty by the solicitor working the interests of the estate; in fact, neither *Ligar* nor an independent solicitor of his, could refuse to produce it.

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The deed of 14th November, 1861, being followed four days after, by the additional provision for purchase by valuation, &c., is strongly confirmatory of its reality as representing a concluded bargain in its operative part. The next material evidence against *Ligar*, under his own hand, is two letters, same date, 2nd March, 1864, one to the executrix and executors of *Bruce* (he had not then taken probate), offering, according to agreement, his share in the New Zealand stations for £4,500, seeming to refer to the agreement 18th November, 1861. The second letter is to "My dear Sir"—I presume another executor—"From what you said, I thought it impossible for Mrs. *Bruce*, under present financial arrangements to enter into the purchase. If you think differently now, I will try and put off the sale for two or three days, so as to suit her convenience." The next document is a minute of meeting of the executrix and executors of *Bruce*, held 1st April, 1864, present—Mrs. *Bruce*, Messrs. *C. W. Ligar*, *J. Watson*, *J. Stoddart*, *S. Stephen*, solicitor. Numerous statements and resolutions about the property are entered. Last of all, "Mr. *Ligar* was authorised to sell station in New Zealand, by private bargain, or public auction, but at not less than £10,000. Minutes confirmed 6th December, 1865; present—*James Stoddart*, *C. W. Ligar* (his signature), *John Watson*." These three documents are not direct admissions, and are not put in issue, and I therefore hesitated to receive them in support of the Plaintiffs' case. Perhaps I should, according to *Goodman v. Boulton*. I did receive them as contradicting that

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made by *Ligar*. As to their weight, I feel that *Ligar* was never asked to explain them, and is now absent. But they very strongly indicate that *Bruce's* representatives' claim against *Ligar* for a moiety of the run and sheep, was fully recognised by the latter down to the sale, 10th August, 1864, and as far as December, 1865, was discussed by all the executors. The death of *Stoddart* and *Margaret V. A. Bruce* has deprived us of their explanations of these matters, and their subsequent inaction. Mr. *Stephen*, the solicitor, should reasonably have been examined by the Plaintiffs. It is more probable that *Ligar* was left to work on the station without interference by *Bruce* or his representatives, the latter simply expecting a moiety when realised, than that *Bruce* and his representatives should have left a demand for 700 sheep unclaimed and unadjusted.

Passing now to parol evidence. The Defendant *Watson* was examined for *Ligar*. He said he was ignorant of the document 22nd March, 1858. "As to documents of 1861 no money passed. *Bruce* stood in a position with Mr. *Ligar*, as member of the Board of Land and Works, as to his contracts." (This I take as a possible reason for a trustee being introduced.) "*Bruce* was anxious to have the deed (November 1861) for some purpose. He said the banks had charge of the execution of the contract by their officials, and he did not know his position with the banks as to the results, and he wanted something to fall back upon—something to show the interest he had in the station. A solicitor prepared the document. It took some days. *Bruce* did not exactly say what he intended to do with it. He said he was in difficulties. *Bruce* asked me to sign a declaration of trust. *Ligar* and *Bruce* had warm words about the matter before the execution of the document of 14th November. *Ligar* complained that *Bruce* had not brought the quantity of sheep promised, at the time they discussed the basis of the deed. *Ligar* complained that the expenses of the commission agents and overseer, ate up more than the profits;

that the few sheep on the station were not enough at all to pay the expenses. Heard *Ligar* complain that the sheep were scabby and few. He said *Bruce* had not put on the number, nor of the quality promised. *Bruce* said he was expecting to be in a better position with his contract, and when he was, would put extra sheep on. They were talking of putting on 2,000 to 3,000 more. *Bruce* said he would do it. It was talked of as of sheep, not money. Remember nothing said of *Bruce* having put on any. I do not know how £3,000 was fixed upon." "*Bruce* told me he had put 600 to 700 sheep on the station in New Zealand, and said the country was good, and when he had means he would put more. He said he had arranged with *Ligar* to do so." This evidence would indicate that *Bruce*, embarrassed, wished a settlement of his claims against *Ligar*—some evidence of their existence and extent, perhaps, to get credit on the document; that they quarrelled over the matter, and so were at arm's length, and making it improbable that *Ligar* would sign a document inconsistent with his rights, without taking some written defeasance. Very likely there were questions between them, some such as *Ligar* now sets up in his answer. What I have to say is whether the deed November, 1861, was a full adjustment of those differences. If the deed was a full adjustment of previous undivided rights, it was immaterial what sum was inserted as a nominal price; both might wish to exaggerate the apparent value of the property. *Watson's* evidence of *Bruce* intending to bring on more sheep, does not shew they were to be as part of his contribution to partnership capital. From the price afterwards produced by the property, it is probable that either or both did add to the 700 sheep originally brought on; yet it is not impossible that the increase of 700 sheep by breeding, and of the value of the run by property in New Zealand rising, may account for the price (£10,000) in 1864. The solicitor employed to prepare the deeds should have been produced or accounted for by the Plaintiffs, instead of the Defendant.

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The next witness examined for *Ligar* is Mr. *Glass*. He says—"I spoke with *Bruce* before 1860 about the purchase of a station in New Zealand. Did not see *Ligar* about it. *Ligar* had spoken to me about 1857 as to my putting on stock on a station he had in New Zealand. *Bruce* saw me it might be two years after. He spoke in private to me; asked if I knew anything of *Ligar's* station in New Zealand, as he had a notion of going into it. I said I knew nothing of it except what *Ligar* told me, which was that he valued the station and stock at £8,000, and had told me that if I put 5,000 to 6,000 ewes on it I would make large profit. *Bruce* did not tell me what *Ligar* had offered him. Met *Bruce* accidentally about a year after; conversed, and asked him had he purchased from *Ligar*. He said he had made arrangements about the station. He said the purchase-money was about the value mentioned before at my house." From this it would appear that *Ligar* after getting the station, and before dealing with *Bruce*, had sought *Glass's* assistance to stock it; had untruly represented it as then stocked, and worth £8,000; that about 1859, *Bruce* was thinking of joining *Ligar*. It seems that either this 1859 date is wrong, or that of the document, 22nd March, 1858, or perhaps *Bruce* doubted after it as to going on. If about 1860 *Bruce* represented he had purchased from *Ligar* a share as for £4,000 (but this evidence is given very vaguely), it affords some support from *Bruce's* mouth, of *Ligar's* case—that originally *Bruce* was to make up £4,000, but it is not sufficient to show that he did not partially fulfil it before 1861, or that the deed, November, 1861, was not a final adjustment, for *Glass* states facts all before that date.

On the whole, I think that the evidence for the Plaintiffs decidedly preponderates, and that *Ligar* should be declared liable for half the proceeds of the station, stock, and purchase-money, and made liable for the costs of suit. His interests are so far opposed to those of the

cestuis que trustent that he cannot properly be continued as a trustee, and he is out of the country; but I have felt some difficulty as to the manner of removing him. In his answer he offers to submit to be removed on being indemnified, and paid all his costs and expenses—a price I am not disposed to give. He also offers to account for all parts of the real and personal estates which have come to his hands, having all just allowances, which I am disposed to direct. The difficulty I have felt is, as to removing him, and appointing another trustee, without taking full accounts of *Bruce's* estate. The Plaintiffs' counsel have suggested that the accounts may be limited to *Ligar's* receipts and disbursements. I have not been referred to, or been able to find any instance of a trustee being removed upon taking accounts so restricted, but have found no authority for the position that the full accounts of an estate must be taken before removal of a trustee, and see no material practical hardship in the course suggested.

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As to the Defendant *Watson* the bill states that he never accounted to *Bruce* in his lifetime, or to his other executors, for any money coming due in respect of the property assigned to him, and although well aware of the sale and of the profits made by *Ligar*, never took any steps to recover them; and it prays that the Defendants may be decreed to pay to the Plaintiff, *Alexander Kennedy Smith* (as trustee), or to new trustees, half the profits and proceeds of sale, and be removed from being trustees. Now, so far as regards *Watson* being a trustee of the deed, November, 1861, he was merely a person whose name was used for some purpose of concealment of *Bruce* as the true owner, and after the execution of the deed December, 1861, he had no duties to perform—nothing to do with the matter—so it would be absurd to ask him to pay anything. As an executor he might perhaps be responsible for neglect in allowing the profits and proceeds to remain

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in *Ligar's* hands, but that would be a liability only important in case of *Ligar's* insolvency, which is not alleged, and which could be enforced only in a suit with different parties seeking to make the co-executors liable—at all events not with one as Plaintiff. Yet I think *Watson* was warranted as to his defence, in not acting as a mere formal party; as he was sought to be charged through *Ligar*, he was entitled to put forward *Ligar's* defence. His answer reiterates *Ligar's* statements as on information and belief; as a witness, he was not able to prove their truth. But I have no reason to say, apart from the letters and minute-book, 1864-1865, which were not in issue, and as to which he was not questioned, that he disbelieved *Ligar's* defence. I have no present material for removing him as a trustee, or depriving him of his costs as such. I shall direct an inquiry, when he first became aware of the said documents and the matters therein contained, and other circumstances in relation thereto.

Decree.
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"Declare, that under the deed, 18th November, 1861, and the
 "declaration of trust, 20th December, 1861, in bill mentioned,
 "the deceased *John V. A. Bruce* was entitled to a moiety of the lease
 "or depasturing license dated the 17th day of July, 1860, therein
 "mentioned, and the sheep of all ages depasturing on the land
 "comprised therein on the 18th November, 1861, and their increase
 "and progeny, and the profits thereof from time to time made until
 "the sale thereof in bill mentioned, and of the clear produce of the
 "said lease and sheep, or their increase and progeny when sold. Refer
 "it to the master to take an account of the receipts and disbursements
 "of and by the Defendant, *C. W. Ligar*, in regard to the said station,
 "sheep, and their increase and progeny, from the said 18th November,
 "1861, to the time of the said sale, and also of all additions made to
 "the stock upon the said station (which were continued thereon
 "to the said sale), made by either the said Defendant *Ligar*, or
 "*John V. A. Bruce*, respectively, and continuing the account during
 "the same time to the time of the said sale, to strike a balance between
 "the said Defendant *Ligar*, and the representatives of the said
 "*John V. A. Bruce*. Direct the master to charge interest upon the
 "said balance at the rate of eight pounds for every hundred pounds by
 "the year, and to continue the account, charging the said Defendant
 "*Ligar* with the several portions of the purchase money, when
 "received, with interest thereon at the same rate to the making of his

"report. Declare the said Defendant *Ligar* liable to pay the
 "Plaintiffs their costs of suit up to and including this decree. Refer it to
 "the master to tax them, and charge the said Defendant with them in
 "account. Refer it to the master to take an account of all receipts
 "and disbursements of the said Defendant *Ligar* in regard to other
 "estate, real or personal, of the deceased *John V. A. Bruce*, as his
 "executor or trustee, and to strike a balance as to his claim upon, or
 "liability to, the said estate, giving all just credits and allowances to
 "the date of his report. Refer it to the master to approve of two or
 "more proper persons to be appointed trustees of the estate of the
 "said *John V. A. Bruce* in the place and stead of the said Defendant
 "*Ligar*, and of *Margaret V. A. Bruce* deceased. Declare that the
 "said Defendant *Ligar* should be removed from being such trustee.
 "Refer it to the master to inquire and report, as to the Defendant
 "*John Watson*, when he first became aware of the letters of the
 "Defendant *Ligar*, dated 8th March, 1864, and the minute of
 "proceedings by the executors of the said *John V. A. Bruce*, dated
 "1st April, 1864, in evidence in this cause, and of the matters
 "therein referred to, and to report all material circumstances of the
 "conduct of the said Defendant *Watson* in relation thereto. Reserve
 "further directions and costs. Liberty to apply."

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 Decree.

From this judgment the Defendant, *Ligar*, now appealed
 to the full Court (j).

May 8, 10.

Argument on
 Appeal.

Mr. *Bunny* and Mr. *Webb*, for the Appellant, cited in
 addition to the cases cited below, *Lidgett v. Williams* (k),
Watts v. Hyde (l), *Malcolm v. Scott* (m), *Graham v.*
Oliver (n), and *Whittley v. Martin* (o).

Mr. *J. W. Stephen* and Mr. *Holroyd* for the Respondents.

Mr. *Bunny* in reply.

Our. adv. vult.

(j) Coram, *Stowell*, C. J.,
Barry, J., and *Williams, J.*
 (k) 4 Hare, 464.
 (l) 2 Phil., 408.

(m) 3 Hare, 39.
 (n) 3 Beav., 124.
 (o) *Id.*, 226.

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 Judgment on
 Appeal.

THE CHIEF JUSTICE:—

The material question in this case is, whether the Appellant *Ligar*—for the appeal is his alone—was afforded a fair opportunity of being examined as a witness on his own behalf. His acts and admissions, uncontradicted and unexplained, admit, in our opinion, of no other conclusion being legitimately drawn therefrom than that which the Court has already deduced. His certificate or declaration of March, 1858; his deed of assignment, the endorsement thereon, and the declaration of trust of November and December, 1861; his letters of March, 1864; his presence at, and approval of, the proceedings of the meeting of executors in April of that year, sanctioning a sale of the station in question, subject to a minimum price; and his approval in December, 1865, of the meeting of April, 1864, confirming the minutes of that meeting—all uncontradicted, and only explained so far as they have as yet been in this suit, form, in our opinion, a chain of evidence in direct support of the case of the Plaintiffs, and quite inconsistent with the position which the Appellant now assumes.

Objections of a technical nature were taken to the admissibility of some of the exhibits, as well as to the frame of the bill, and the form of the decree. We think the document of 22nd March, 1858, was sufficiently in issue by the statement that by an agreement the Appellant and the late *John Vans Agnew Bruce* were partners, or interested in the station. Nor was there any privilege or ground, in our opinion, on which its production could, with propriety, have been withheld. We regard the suit, substantially, as instituted by the representatives of one of two persons, jointly interested in a station, to recover the share of their testator in the proceeds—the station having been sold, and the purchase-money retained by that other person. His position, as one thus jointly interested with the testator, is so inconsistent with his continuance as trustee of the same estate,

that he ought not, for his own sake, to be subjected to the pressure of such conflicting interests. We see no substantial objection to the mode in which the accounts have been directed to be taken. If the Appellant's present objections were to be maintained, it would, in many instances, be rendered impossible, for a long space of time at least, to remove from their trusteeship most objectionable trustees. The accounts, too, which it is now urged are indispensable, were not asked for in the answer. We need not enter on the objection taken to the decree as regards the Defendant *Watson*, for he does not appeal therefrom.

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It is necessary therefore, we think, only to consider the application for a commission made by the Appellant, and the circumstances under which it was refused; and, even as regards this point, the order refusing the commission was not appealed against, but we desire to meet the case in the way it was presented to us. As a rule, an application for a commission to examine witnesses should be regarded almost as of right if made *bonâ fide*; and, subject to the observations we shall presently offer, we are not prepared to draw any distinction between the examination of witnesses generally, and of those who are parties to the suit. It is obvious, however, that where one of the parties makes the application, the question of *bonâ fides* demands more close attention, especially when the applicant has been within the jurisdiction, and has left it after the bill has been filed. In such a case a presumption fairly arises that a defendant who, by his testimony, could give a satisfactory answer to a *prima facie* case against him, would not hesitate, for his own sake, to subject himself to examination, and court further enquiry. Two reasons are offered for the Appellant in the present case not having done so. One, that he would have thereby prematurely disclosed his defence. We can conceive instances in which this might possibly afford a sufficient excuse; for example, where the bill was for discovery, or where the Plaintiff's equity, it

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was expected, would be supported mainly by the Defendant's answer; but where, as in the present, the Plaintiff's cause of suit is based on a joint interest with the defendant, and where a strong case, if uncontradicted, is launched against him, we cannot appreciate the force of the reasoning. If the answer will amount to a satisfactory defence, it is not very apparent why investigation should be feared; indeed, the very nature of the excuse is in such a case almost suggestive of an apprehension of weakness. The other reason was one of mere personal-inconvenience; but such inconvenience cannot be allowed to weigh against the probability of positive injustice to the Plaintiffs. The period allowed for leave of absence from official duties might no doubt be abridged, and the enjoyment anticipated during that period thus lessened; but the Defendant's first duty is to the Court and to the suitor, and in this respect there is a very substantial distinction between the examination of an ordinary witness and of a party to the suit. The witness owes no further duty to the Court than to obey its mandate in the form of a subpoena, and if that obedience would subject him to unnecessary delay and inconvenience, a commission may be issued: but the party owes to the Court the duty of every litigant, namely, to attend to the litigation, and such a duty ought not to be postponed for mere enjoyment. The one has a control over his own movements and the arrangement of his own affairs, which the other has not, and ought not to be allowed indirectly to exercise over the affairs of another. The party to the suit ought to forego pleasure and attend to business; if he chooses not to do so, he must abide the consequences. We think that both reasons have been fully dealt with in the judgment pronounced.

We conclude by stating that we believe the Plaintiffs' case has been satisfactorily sustained, that the documentary evidence was not privileged, and properly received. We consider the removal of the Appellant from the office of

trustee was imperative, and that under the circumstances, which are peculiar, the limited nature of the accounts directed meets the equity of the case; that it is not the privilege of the Appellant to take exception to the structure of the suit or the nature of the decree on behalf of his Co-defendant *Watson*, who is quiescent, and has not appealed; and we are of opinion the alleged imputed staleness of the demand presents no insuperable objection to the maintenance of the suit.

We concur in the judgment delivered, and direct that the appeal be dismissed, and with costs.

Appeal dismissed with costs.

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THE ALADDIN GOLD MINING COMPANY
REGISTERED v. THE ALADDIN AND
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COMPANY REGISTERED.

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July 5, 6, 22.
September
23, 24, 25.

A bill will lie by a lessee in possession under a gold-mining lease granted by the Crown under No. 291, to restrain a tortious mining on, and removal of gold from, the demised premises.

In a trespass suit by the lessees under a gold-mining lease, granted by the Crown under No. 291, the Defendants relied upon a title derived from persons, at the time of the granting of the lease, in occupation under miners' rights of the land alleged to have been trespassed upon,

Held, that such defence might be insisted on without a cross bill; and that it was not necessary for the Defendants to resort to a *scire facias* to set aside the lease.

A gold-mining lease by the Crown under No. 291, if the parcels comprise land at the time of the demise occupied by the holder of a miner's right, who has not assented to the lease, is void, *quoad* the land so occupied, and no proceedings to set it aside are necessary.

The applicant for a gold-mining lease under No. 291, must be a person, or a corporation; a contemplated company cannot be an applicant.

The Governor is not warranted in granting a lease of auriferous land to an alleged assignee of the applicant, against the protest of the applicant; and

Semble, that the Governor has no power under No. 291, sec. 24, to grant a lease of auriferous land to any one but the applicant.

Where an appeal to the full Court is dismissed with costs, no order is necessary for the payment to the Respondent of the £50 lodged in Court by the Appellant.

THIS was a bill filed by the Plaintiff company as lessees under a gold-mining lease, issued to the company under the "*Mining Statute 1865*," against the Defendant company, *Wekey*, its manager, and *Wilcox*, tributer of the Defendant company, to restrain an alleged trespass upon the demised premises, by the Defendant company and *Wilcox*. The case, as made by the bill, stated the lease; that the Plaintiffs had entered into possession under the lease, and expended a large sum of money in mining on the land; and that the Defendants had trespassed on the land and removed large quantities of gold and auriferous earth therefrom, and still continued such trespass and removal of gold. The bill prayed an injunction and account. An interim injunction was obtained on motion before answer. The Defendants, by their answer, impeached the validity of the lease, on the ground that it was not granted on the application of the

derived from persons, at the time of the granting of the lease, in occupation under miners' rights of the land alleged to have been trespassed upon,

Held, that such defence might be insisted on without a cross bill; and that it was not necessary for the Defendants to resort to a *scire facias* to set aside the lease.

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Semble, that the Governor has no power under No. 291, sec. 24, to grant a lease of auriferous land to any one but the applicant.

Where an appeal to the full Court is dismissed with costs, no order is necessary for the payment to the Respondent of the £50 lodged in Court by the Appellant.

Plaintiff company, but of the Defendant *Wekey*; that the land demised was, at the date of the lease, in the possession of three persons—*Wekey*, *Root*, and *Arkley*—under their miners' rights, who had not consented to the lease being granted; that the lease was obtained by fraud and misrepresentation; and was issued in violation of the "*Mining Statute 1865*" and the leasing regulations made thereunder. They also alleged that the Plaintiff company had never entered into possession of the leased land; and denied the trespass alleged by the bill; but admitted that *Wilcox*, as the tributer of the Defendant company, had mined upon the land in question, and removed gold therefrom. The answer also stated that the Plaintiff company had instituted a complaint before a warden against the Defendant company for a trespass upon the same land, which had been dismissed with costs; and submitted that the Plaintiffs not having appealed therefrom were incapacitated from instituting this suit; and also that the Plaintiffs had adequate relief without the aid of this Court, under the jurisdiction given to Courts of Mines and Wardens by the "*Mining Statute 1865*." The facts, as they came out in evidence, are fully stated in the judgment of His Honor Mr. Justice *Molesworth*.

Mr. *J. W. Stephen* and Mr. *Webb* for the Plaintiffs. The Plaintiffs are entitled to maintain this suit upon the strength of their title as lessees until the lease be set aside by *scire facias* or by this Court for fraud. The lease is, by the "*Transfer of Land Statute*," sec. 15, made a record, and it cannot be impeached except by *scire facias*, which will lie in this colony, Crown grants and leases being here expressly made matters of record: *The Queen v. Hughes* (*p*). But even if this Court can, in this suit, go behind the lease, there is nothing shewn to invalidate it. The evidence shews that the land demised was unoccupied, except as to a small portion of it which was held by *Wekey*, *Root*, and *Arkley*; and

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it is shewn that they assented to the lease. The application for the lease was made by "*Sigismund Wekey* for the Aladdin Gold-Mining Company," and the lease was properly issued to the company. There is nothing requiring the lease to be issued to the applicant himself, it may be to the assignee or nominee; and, by the "*Mining Statute 1865*," sec. 39, may be granted notwithstanding there may have been a non-compliance with the regulations. The proceedings in the Warden's Court do not estop the Plaintiffs, for there is a continuing trespass, and a trespass is complained of at the date of the bill, which is subsequent to the order of the Warden. In order to constitute an estoppel, the first judgment must have directly decided the point in issue in the second suit: *Taylor on Evidence*, sec. 1507. Here it is sworn that the Plaintiffs title never came in question before the Warden, but the complaint was dismissed from the inability of the Complainants to identify with the Defendant company, the individuals proved to have trespassed. As to the objection that the Plaintiffs have adequate relief in the Court of Mines or Warden's Court, there is nothing in the Act constituting those Courts, abridging the jurisdiction of this Court; and the jurisdiction of this Court cannot be taken away or abridged except by express enactment.

Mr. *Bunny* and Mr. *W. V. Smith* for the Defendants. The question raised by this bill is a pure legal question to be determined in a Court of law, and the Plaintiffs' proper remedy is ejectment: *Slade v. Barlow* (q), *Star Freehold Company v. Inkermann and Durham Company* (r). There is no evidence of irreparable damage, or of the Defendants mining operations being carried on recklessly or unskilfully so as to warrant the interposition of a Court of Equity—*Jackson v. London and North-Western Railway Company* (s)—and even if this Court has jurisdiction, it will not, in

(q) L. R., 7 Eq., 296.

(r) *Ante*, Vol. III., Eq., 181.

(s) 6 Ry. Ca.'s, 112.

its discretion, exercise it in such a case as the present: *Attorney-General v. Corporation of Norwich* (t). The evidence supports the case of fraud set up by the answer, and this Court will not, therefore, in the face of that, give the Plaintiffs the relief sought by this suit. The subject-matter of this cause is *res adjudicata*, and this Court will not entertain a suit, which is, in effect, an appeal from the Warden's decision after the time for appealing has elapsed. The rule of estoppel by a former suit applies in a case of trespass: *Whittaker v. Jackson* (v). [*Molesworth, J.*—That case turned upon a verdict having been found in the former action upon the plea of *liberum tenementum*, which concluded the question of right.] The "*Mining Statute*" gives power to the Warden to do all that is asked by this bill; and this Court will not, therefore, assume jurisdiction, but leave the parties to their remedy before the ordinary tribunal constituted for dealing with mining disputes.

Mr. J. W. Stephen in reply. This lease cannot be set aside for fraud, except by a cross bill: *Simpson v. Lord Howden* (w). This is not a mere ejectment bill; but the Plaintiffs being in possession, the Defendants claim under an adverse title, and are committing acts tending to the destruction of the estate; and in such a case equity will interfere by injunction: *Lowndes v. Bettie* (x), *Cowper v. Baker* (y).

Our adv. vult.

MR. JUSTICE MOLESWORTH:—

This suit is brought by the Plaintiff company against the Defendant company, its manager, Mr. *Wekey*, and tenant, Mr. *Wilcox*, to restrain mining for gold on land comprised in a mining lease from the Crown to the Plaintiff company, and for an account of gold already taken.

(f) 1 Keen, 713.

(v) 33 L. J., N. S. Ex., 181.

(w) 3 Myl. & Cr., 97.

(x) 33 L. J., N. S., Chy., 451.

(y) 17 Ves., 128.

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Wekey and Messrs. *Root* and *Arkley* occupied and worked a mining claim, Beechworth district, in equal shares, for which *Wekey* alone was registered. They contemplated forming a company, to be called the Aladdin Gold-Mining Company, to work the claim; and by articles, 22nd October, 1867, agreed that a company composed of them, and other persons who might afterwards purchase shares or interests, should be so called and registered under No. 228; that the three should respectively do specified work on and about the claim, and have each a fourth in the claim and company; that their working should proceed to crushing, and then be suspended and the company formed, and the remaining fourth share sold; and that the partnership provision should continue until the Aladdin Gold-Mining Company should be registered, with the concurrence of all three. Their work and crushing proceeding favourably, on the 6th December, 1867, *Wekey* made a formal application, under the "*Mining Statute*," to the Minister of Mines, for a lease of about twenty-five acres, including the claim, stating under the head "Name of applicant or applicants, and style under which it is intended that the business shall be carried on," "*Sigismund Wekey* for the Aladdin Gold-Mining Company;" under the head, "Name of each person who, if any, is occupying the land applied for," "*Sigismund Wekey* for the Aladdin Gold-Mining Company;" under "General remarks," "A portion of the ground now applied for is now held under miners' rights by the applicant, for the Aladdin Gold-Mining Company."

By documents of 6th February, 1868, *Root* and *Arkley* authorised *Wekey* to make arrangements for organising a company, or providing capital for machinery for working the quartz claim and lease known as the Aladdin Gold-Mining Company's mine, all three to be placed on an equal footing, and share advantages obtained by assigning their interests to a company, the other two to contribute

to *Wekey's* expenses going to Melbourne, &c.; and that *Wekey* should have a certain commission out of the shares or interest procured for the other two. Armed with this authority, *Wekey* communicated with Mr. *Jones* about forming a company, who examined the mine, failed in forming a company, but introduced him to Mr. *Longmore*, who examined the mine, and hoped to form a company; and four persons, namely, *Wekey*, *Longmore*, *Jones*, and *Naylor* agreed to start a company; as a preliminary to which, on or about 20th April, 1868, *Wekey* wrote a letter to the Minister of Mines, requesting him to direct that the gold-mining lease applied for by him on behalf of the Aladdin Gold-Mining Company might be issued, if deemed expedient, to the Aladdin Gold-Mining Company Registered, in its incorporate capacity; and stating that Mr. *Longmore*, the legal manager of the company, would produce the certificate of registration of the company in due course, and also comply with any intimation the Minister should cause to be conveyed to him on the subject. This letter was handed to Mr. *Jones*, and by him to the Minister's office. On the 23rd April, 1868, the four met as for preliminary meeting of Aladdin Company, to be registered under No. 228, and agreed to form themselves into a board of provisional directors pending registration, with power to add to their number; that the formation of the company should be proceeded with according to a prospectus prepared; that *Longmore* should be appointed to the office of legal manager of the company, and should proceed to get the company registered; that in consideration of services rendered in the formation of the company, the sum of £100 should be voted to *Wekey* as a bonus, the amount to be charged to construction and preliminary expenses; and that *Wekey* should hand over to the legal manager his note to the Minister of Mines for the assignment of the lease to the Aladdin Gold-Mining Company Registered in its incorporate capacity. There was then a resolution passed in *Wekey's* absence that *Longmore*

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should be authorised to pay *Wekey* £100; £50 on assignment of lease, and £50 on first allotment of shares. On 25th April, *Wekey* got the £50, and gave receipt as for part payment of the £100, voted and payable to him on construction account. The day before, 24th April, a *Gazette* notice appeared from the Minister that it was intended, at the expiration of a month, to grant the lease, stating under the head "Name of applicant and style under which it is intended that the business shall be carried on," "*S. Wekey*. The Aladdin Gold-Mining Company."

Wekey having gone to Gaffney's Creek, a correspondence occurred between him and *Longmore* as to a draft deed for the company, which *Wekey* had prepared, and difficulties about it—*Wekey* urging expedition, complaining of delay. About the same time *Root* wrote to *Longmore*, inquiring upon what terms *Wekey* was forming the Aladdin Company, and if it was intended to issue scrips for him and *Arkley* in their own names, as they would object to any other course, stating he was equally intimate with working, and requesting *Longmore* not to mention the letter to *Wekey*. *Longmore* sent a copy of this to *Wekey* as by direction of the provisional directory, but went on afterwards dealing with *Wekey* only. A Mr. *Robyns* went to the mine from Melbourne about 22nd May, having been engaged by *Longmore*, as mining manager of the Aladdin Gold-Mining Company, saw *Wekey*, *Root*, and *Arkley*, and told them so. He had a written authority, not given in evidence. He examined the claim, consulted with them about its management. *Wekey* lent him a rope, &c. He employed *Arkley* for a time working, *Root* having intended to work, but being accidentally prevented. *Root* and *Arkley* had objected to *Robyns* taking possession, but *Wekey* told them that the company was formed, *Longmore* the legal manager; that they two were only shareholders and could not stop *Robyns*; and they and *Robyns* agree that he took possession.

About the same time (26th May) *Wekey* wrote to *Longmore* stating that he would assist *Robyns* with rope, &c., to enable him to comply with instructions from Melbourne directors, but complaining that before the completion of the arrangement with him, instructions had been given to a person to enter on the mine and take gold. The actual working by *Robins* and *Arkley* was for three days only, and then *Wekey* announced that he would stop the work. *Robyns* said that he could not recognise his authority, and was himself responsible to the legal manager. *Arkley* at *Wekey's* request, did not come to work the next day, and *Robyns*, though remaining in the district, did nothing more upon the land until 26th September.

Wekey again came to Melbourne, and on 20th June, he, *Longmore*, *Jones*, and *Naylor* met as owners and promoters of the Aladdin Gold-Mining Company, and entered into a new agreement, reciting difficulties in launching the company according to the former prospectus, and making totally new provisions, giving themselves the same proportion of paid-up shares as before intended, but altering the terms of payment of the other shareholders, and altering a provision as to reserved shares. They met again on the 26th June, and an engrossed intended deed for the company was produced, to which *Wekey* totally objected. He had required, also, various other arrangements—a guarantee from the legal manager, and certain payments for expenses to himself. *Longmore* requested him to sign a new letter to the Minister of Mines, similar to that of 20th April, which he refused, and instead of that, 26th June, wrote a letter to that Minister, stating, "Circumstances have arisen which have rendered it unavoidable for me to withdraw that portion of my letter having reference to my proposition to appoint *Francis Longmore*, Esq., M.P., to the office of legal manager to the Aladdin Gold-Mining Company, until my proposition to that effect shall have been either approved of or disallowed by a meeting of the shareholders

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in the company, to be convened immediately, and that Mr. *Longmore* has at present no connection with the aforesaid Aladdin Gold-Mining Company, and he has no authority whatsoever to act on behalf of the aforesaid company." In a few days after, *Wekey* got his solicitor to write to *Longmore*, &c., I may say briefly, breaking off the negotiation on the ground of delay, and non-compliance with stipulations. Notwithstanding this, *Longmore* proceeded for the registration of a company of the name proposed, and sent in a declaration, including *Wekey* among the shareholders. The proposed company was advertised on 7th July. On 10th July, *Wekey* wrote a letter to the clerk of the Court of Mines, protesting against the registration of the company, as his name was used without his consent, and 11th July, revoked *Longmore's* authority to form the company. On the 21st July, *Wekey*, *Root*, and *Arkley*, wrote conjointly to the Minister of Mines a long letter, stating that, until answer to the letter of the 26th June, *Wekey* withdrew his application for lease, and they would continue to hold the land applied for under miners' rights, it being in their possession, and worked by them. On the 3rd of August a letter was sent to *Wekey* from the office of the Minister of Mines, stating that a lease was in course of preparation in the name of the Aladdin Gold-Mining Company Registered, and should be delivered to the persons lawfully entitled to execute and take delivery of the same. The lease accordingly was actually executed, I presume, on the 10th August. *Wekey* and his solicitor sent various protests, withdrawal of application, &c., after, between that date and the execution of the lease by the company and delivery of it to *Longmore*, which was on 17th September.

In the meantime, *Wekey*, *Root*, and *Arkley*, joined a company called the Try Again Company, and amalgamated their claim with it, and the defendant company was, 19th August, incorporated under No. 228, as the Aladdin

and Try Again United Gold-Mining Company Registered, the three getting shares as a price of their former claim. On the 26th September, this last company let the ground in dispute on tribute to *Wilcox*; and *Robyns* attempted to work on behalf of the Plaintiff company, and some riotous proceedings occurred. On the 8th October the Plaintiff company issued a plaint from a Warden's court against the Defendant company, to compel them to cease from encroachment and pay damages. The case was heard 20th October, before the Warden and assessors, and the plaint was dismissed. *Root* and *Arkley* say that at the hearing of it they discovered that *Wekey* had been dealing unfairly by them in getting the £100 for himself, and proposing to take the shares representing the property of the three in the claim, in his own name. The Defendant company sued *Root* and *Arkley* for calls, and their shares in it were sold in execution, and they now appear as witnesses for and favourers of the Plaintiff company.

The Plaintiff company has not sought, either by pleading or evidence, to show a title derived from *Wekey*, *Root*, and *Arkley* by contract, and I think, could not. The arrangement with *Wekey* (23rd April) failed, and a new arrangement was sought to be substituted (20th June), and *Wekey* then concurred in a partial arrangement which did not include a continued right to use *Wekey's* letter to the minister, 20th April. *Longmore*, knowing that, sought a renewal of it, which *Wekey* refused, and, having become more particular as to the terms of contract which should be completed in the deed, and dissatisfied with the deed prepared, and non-compliance with other stipulations which he had a clear right to make, before concluding the bargain, he broke it off. The consideration to him was not merely the £100 given for his exertions, but the unpaid shares directly representing the property in the mine, and until the terms about those shares were fully adjusted, the bargain was incomplete. Breaking off, he should have

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returned the £50, but was not specially asked for it, and he has some excuse for retaining it as long as *Longmore* uses the letter. As to *Root* and *Arkley*, the case of *Longmore*, *Jones*, and *Naylor* would be even worse, as, notwithstanding notice of their rights, *Longmore & Co.* continued dealing with *Wekey*. *Root* and *Arkley* have lawfully assigned their interest in the mine to the Defendant company for value, and their change of feeling cannot defeat the right of that company as their assigns.

The Defendant company has title by registration; but the Plaintiff company has relied simply on its lease. The Act No. 291, sec. 24, authorises the Governor to grant to any person or elective body corporate, subject to the provisions of the Act, a lease, &c., of Crown lands not demised and not occupied by the holder of a miner's right, unless with the consent of such holder. Sec. 37 directs preliminaries to be done by applicant for lease, and entitles him to damages against immediate trespassers if he ultimately gets the lease. Sec. 38 directs wardens to inquire about applications for leases and objections. Sec. 39 declares that it shall not be obligatory to grant a lease to the applicant, but if his application is refused, he shall be informed of the reasons for the refusal, and the lease may be granted although the person applying may not in all respects have complied with regulations. Sec. 40, if land applied for comprises land held by applicant under miner's right, such right shall not be affected by such application, or the refusal, abandonment, or failure thereof; and if such lease is granted, the interest under miner's right shall merge in the lease. Sec. 41 directs that no lease shall issue until a month after notice of intention to execute it under these sections. I think the applicant must be a person or persons, or a corporation. Secondly, I rather think that the Governor has no power to lease to any one but the applicant. It is his pretensions which the Governor is to weigh, and individuals interested in opposing are to resist. But, at all

events, the Governor is not warranted in granting a lease to a person or corporation not the applicant, against the protest of the applicant—to enter into inquiry whether the applicant has effectually assigned his interest, and grant it to the assignee; he can only refuse the lease altogether.

Applying this to the documents in this case a contemplated company could not, I think, be an applicant. The real applicant should be taken to be *Wekey*, expressing an intended trust for the company named, but that would not mean for any company which might afterwards be incorporated bearing that name. If the words “Aladdin, &c., Company,” December, 1867, had any meaning as to persons, they were *Wekey*, *Root*, and *Arkley*, but I think the application was for a lease to himself. I think then, *Wekey* had a right to countermand the direction to issue the lease to the company and hand it to *Longmore* 20th April, and did so effectually by the letters of 26th June and 21st July, although those letters were so awkwardly framed, that the Minister of Mines might naturally mistake from them the history of the company’s name, and overlook the true legal difficulty. It is unnecessary for me to consider the effect of protests between the execution and issuing of the lease. But the Act prevents leases affecting occupants under miners’ rights unless the leases are made with their consent. Now, I think, on the evidence, that *Robyn’s* possession was for three days only, and could not be a possession for a company afterwards to be incorporated—it was for the board of provisional directors, of whom *Wekey* was one; *Wekey* turned him out, and therefore I think that the legal occupation of *Wekey*, *Root*, and *Arkley*, revived and continued until the lease was granted. Their title was certainly not abandoned to the world, and no legal steps were taken to have it declared forfeited.

But it is insisted on behalf of the Plaintiff, that the lease is valid until set aside by *scire facias*, and that it being

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enrolled under No. 301, sec. 15, subjects it to that writ. That writ might be the proper one for the Attorney-General, on behalf of the Crown, to resort to; but I cannot see that persons whose title the lease would wrongfully affect, should seek the fiat of the Attorney-General to avoid it, as contrary to the Act, enabling the Governor to make it, especially in order to resist the lessee proceeding in equity. But these leases are so framed as not to purport to have a tortious operation; they are expressly subject to "any interest or authority which any person may now lawfully use or exercise for mining purposes, or for discovering the existence of gold in or upon the land hereby demised."

It is argued also for the Plaintiff that the Defendant can be relieved from the lease only by cross bill. If a Defendant sets up a defence to the enforcement of a Plaintiff's right under his deed, and it is inequitable that the Plaintiff's rights should be suspended unless the deed is totally set aside upon terms—then a cross bill is necessary, but not in cases where a third person or the Crown has by deed affected to grant an interest inconsistent with the Defendant's rights.

The Defendant's counsel insisted that the question was concluded by the dismissal order of the warden's court, 20th October; but according to *Longmore's* evidence, which is uncontradicted, that dismissal was because the Plaintiff could not fix the Defendant company with the trespass, so that the title was not decided; and as that case has altogether terminated, the Plaintiff, if entitled to redress, might seek it in the Supreme Court.

The Defendant's counsel argued strenuously against the jurisdiction of a Court of equity to grant on the facts an injunction for trespass. I think if the bill were true—if the Plaintiff company, since a good lease on 10th August, were in possession, having expended a large sum of money

in carrying on mining operations, and the Defendant company and tenant were from 3rd October continuously, tortiously mining under the leased land—that the remedy by bill in equity would lie. *Hanson v. Gardiner* (x), *Corper v. Baker* (a); cases collected in *Lownes v. Bettie* (b). This land is principally valuable for gold mining; the subtraction of gold is destructive of its value, as gold does not grow; and when gold is removed mixed with earth, and separated by a trespasser, its value is not easily ascertained. But according to the true facts of this case, there being no clear possession or actual working from 10th August by either party, no expenditure by Plaintiffs, and a collision about 26th September by the two parties, each claiming a right to work, I do not think that the Plaintiff company should have had relief in equity further than retaining the bill, with interim injunction, until the right was tried at law. On the whole, I dismiss the bill, with costs, and dissolve the injunction.

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From this judgment the Plaintiffs now appealed on the following grounds:—

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(1) That His Honor by his said decree, dismissed the bill herein with costs, whereas it appeared by the evidence taken in this cause that the Plaintiffs were entitled to an injunction, as prayed by the said bill.

(2) That it appeared by the evidence in this cause, that the Plaintiffs were owners of the land in dispute under an indenture of lease dated the 10th August, 1868, duly executed in the name and on behalf of Her Majesty, under the provisions of the "*Mining Statute 1865*"; but His Honor was of opinion that such lease was invalid as between the Plaintiffs and Defendants, or that the Defendants had an interest in the land subject to which only, such lease was granted.

(3) That it was not proved by the evidence in the cause that the Defendants had any such interest in the said land.

(x) 7 Vea., 305.
(a) 17 Ib., 128.

(b) 33 L. J., N. S., Chy., 451.

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(4) That the said lease ought, as the Plaintiffs submit, to be considered a good valid and subsisting Lease until set aside by the order or decree of a competent Court.

(5) That the said lease was duly registered under the provisions of the "*Transfer of Land Statute*," and it is thereby enrolled as of record and can, as the Plaintiffs are advised, only be set aside by writ of *scire facias* or at all events, in a suit in equity instituted for that purpose.

(6) That the grounds upon which His Honor considered that such lease was improperly granted, were insufficient.

(7) That the bill ought not to have been dismissed, without, at all events, first trying the validity of the said lease at law, or giving the Plaintiffs the option of trying the same.

Mr. Walsh, Mr. J. W. Stephen, Mr. Fellows, and Mr. Webb, for the Appellants.

Mr. Bunny and Mr. Holroyd for the Respondants.

The following cases were referred to in addition to those cited in the Court below. For the Appellants: *Holderness v. Rankin* (c), *Nicholls v. Atherston* (d), *Smart v. Sanders* (e), and *Vonhöllen v. Knowles* (f). For the Respondents: *Stocker v. Wedderburn* (g), *Hamilton v. Smith* (h), and *Vincent v. Hunter* (j).

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THE CHIEF JUSTICE:—

This is a bill for a trespass. It is scarcely to be now questioned that such a bill will lie. But, as it appears to us, the whole question in this case may be narrowed into a very small issue indeed. The lease is granted under sec. 24 of the "*Mining Statute*, 1865." That statute enables the Governor to grant a lease of lands "not occupied by the holder of a miner's right,

(c) 2 De G. F. & J., 258.

(d) 10 Q. B., 944.

(e) 5 C. B., 916.

(f) 12 M. & W., 602.

(g) 26 L. J., Chy., 713.

(h) 28 *Ib.*, 404.

(j) 5 Hare, 330.

unless with the consent of such holder." The power thus derived is the only power the Crown possesses to deal with these lands; and therefore, the lease of any land on the gold-fields, if the parcels comprise land then occupied by the holder of a miner's right, is void. In fact, the policy of the statute is this—that although the holder of a miner's right has not the legal estate, or any estate at all known to the law, yet it is considered the highest estate under this statute. If the holder of the land under a miner's right consider it advisable to abandon that title and obtain a lease, he may do so; and any lease granted to any other person is subject to his right, so that he, although the holder of a mere license, and of no estate at all, is put in a higher position than the holder of a lease. Now in this case there can be no doubt that *Wekey* held a miner's right for a portion of this land, and that he continued to hold that up to the issue of the lease. Therefore, as regards that land so occupied, this lease is inoperative. The extent so occupied is not shewn. The conclusion from the whole of the evidence is, that the part alleged to have been trespassed upon was so held. But whether it be so or not, is, in my opinion, comparatively immaterial, for the case made by the bill is, that the Plaintiffs are entitled to the whole of the land covered by the lease.

We were invited to rule that because this lease is registered and enrolled, therefore we were not to go behind it. But the Court is not called upon to set aside anything; there is nothing to set aside. The lease does not apply to this land, because it is held under miners' rights, and I think that is unanswerable. Then arises the question whether the holders of those miners' rights have assented to the lease, for the section adds these words "unless with the consent of such holder." Did *Wekey* give his consent in such a way as to make it revocable, and if so, has it been revoked. If the

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arrangement arrived at on the 23rd April, had been carried out, that would have rendered *Wekey's* consent irrevocable, but we think the evidence shews that it was not; and on the 20th June the parties meet and treat the whole thing as disposed of, and a new arrangement is entered into. We offer no opinion whether it is competent for the Governor to issue the lease to any other person than the applicant, although it appears to be very difficult to answer the arguments that he could not; and it appears anomalous to place the assignee of the applicant before, in a better position than the assignee of the applicant after, the lease has been granted; nor is it necessary to consider the effect of the registration and enrolment. It may be good or it may be bad. The Defendants may concede that it is perfectly good. All they say is, the document you possess does not apply to the land in question. As to the necessity of setting aside the lease, this Court in a recent case of *Wilson v. Threlkeld* were very much pressed with the same argument, in which teas supposed to belong to *Threlkeld* were attached by a bank. It turned out that those teas were not the property of *Threlkeld*, and the bank disposed of them without obtaining an order setting aside the attachment. Application was made to punish the bank for acting against the order of this Court, and it was urged upon us that until the order was set aside, no person had a right to treat it as of no operation. The answer suggested at the bar, and which appeared to us to be correct, was, there was nothing to set aside; the teas were not the teas of *Threlkeld*; and the views we then entertained have, as far as we have heard, been confirmed on appeal to the Privy Council (*k*). So here the lease does not touch the *locus in quo*. We think the decree appealed from is substantially correct; that the bill was properly dismissed; and the appeal will be dismissed with costs.

(*k*) See *Wilson v. Traill*—L. R., 3 P. C., 33.

MR. JUSTICE BARRY :—

I conceive that the judgment of the Court below is correct, and that the appeal ought to be dismissed with costs. The question of the jurisdiction of the Court in cases of this nature, has been thoroughly investigated in *Lowndes v. Bettie*, where there is a review of the cases. Although it does appear to be the case that the Court has amplified its jurisdiction, so as to restrain a trespass amounting to irremediable injury, there must be something more than a *prima facie* case shewn by the Plaintiff, before the Defendant in possession will be disturbed. Possession is a strong evidence of title. The Plaintiffs assert in their Bill that they are in possession by virtue of their lease, but I think the evidence fails to establish that. The evidence shews that the Defendant *Wekey* was in occupation under his miner's right, and his interest under that, is not affected by the lease. I think the decision of the learned judge is right, and that the appeal should be dismissed.

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MR. JUSTICE WILLIAMS :—

It appeared to me during the argument that the question was limited to a very narrow compass, namely, whether the resolutions of the 23rd April were carried out or not. If those resolutions had been carried out, then I think the argument for the Plaintiffs would have been of a very powerful character, and that an authority coupled with an interest would have existed, which would have been irrevocable. If the facts had supported that view, the Plaintiffs would have stood on much stronger ground; but it seems to me the facts do not support that view and the Plaintiffs' case is altogether unsupported.

Mr. *Bunny* applied for an order for the payment to the Respondents of the £50 deposit.

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THE CHIEF JUSTICE.—Inasmuch as that is deposited to abide the costs, no order is necessary. It is only necessary to make an order to pay it to the person depositing it.

Appeal dismissed, with costs.

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Sept. 27, 28.

POKORNEY v. DITCHBURNE.

F. and H., owners of a gold mine, agreed with *P.* to sell the mine on certain terms, within a time fixed, or otherwise the agreement was to be void. *P.* agreed with *D. and T.* that they should act jointly with him in forming a company to purchase the mine upon the terms fixed by *F. and H.*, and should

receive half the benefit to be derived by *P.* under his agreement with *F. and H.* Before the expiration of the time *D. and T.* negotiated with *F. and H.* for the purchase of the mine themselves, and immediately after the expiration of the time purchased the mine. On bill by *P.* against *D. and T.* for a share of the benefit of their purchase,

Held, that the Defendants were not guilty of any breach of partnership confidence towards the Plaintiff, and damurrer for want of equity allowed.

There is no contract, either express or implied, that co-adventurers in a contemplated purchase, to be completed within a given time, shall not deal singly with the vendor, for a bargain, to come into operation after the original bargain has expired by effluxion of time.

forming a company under the agreement; Defendants to get an equal share with him in the benefits of the agreement, and a moiety of the commission of £300. The Defendants appointed a person named *Bland* to inspect the mines, and he accompanied the Plaintiff to Blackwood for that purpose. It was there further agreed between the Plaintiff and *Fitzgerald* and *Harris*, that the Plaintiff should have the option of purchasing from them one-sixteenth in the company within six months after registration. *Bland* reported favourably of the undertaking, and the Defendants agreed to assist in forming the company on the terms stated. Defendants subsequently suggested to the Plaintiff that as the share market was not then in a good condition for quartz-mining stock, the attempt to float the venture should be postponed, and the Plaintiff, at the suggestion of the Defendants, having communicated with *Fitzgerald* and *Harris*, obtained an extension of the agreement till the 17th December. Plaintiff by an arrangement with the Defendants, wrote out a prospectus and prepared the promoters' scrip; but time passed on, and the company was not formed, the Defendants always postponing the formation of the company. Applications were made by the Plaintiff to the Defendants on the subject, to which the reply was given on the 10th December, that the market was not yet ripe for the Blackwood claims. On 15th December, the Plaintiff asked *Fitzgerald* and *Harris* for a further extension of time for forming the company, which was refused by letter dated 21st December. Plaintiff subsequently discovered that on the 18th December, the Defendant *Ditchburne* had arrived at Blackwood, and immediately made an agreement with *Fitzgerald* and *Harris* for the formation of a company on certain terms stated in the bill, one of them being that 1,775 shares should be given to the Defendants. Immediate steps were taken by the Defendants to form the company, which was registered as the "*Sultan Quartz-mining Company*," the registered shareholders being *Fitzgerald*, *Harris*, and *Ditchburne*. The Plaintiff thereupon

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applied to the Defendants for a half share in their interest in the company, and being refused filed this bill, charging that the agreement made between Defendants and *Fitzgerald* and *Harris* was made in fraud of the Plaintiff; and that the Plaintiff ought to be deemed a partner of the Defendants in the transaction, and entitled to a half of the profits made. The bill alleged that *Ditchburne* and *Tarte* were in communication with *Fitzgerald* and *Harris* before the 17th December, though the agreement between them was not formally completed till after that date; and that the agreement was made in consequence of, and upon, the information supplied by the Plaintiff to the Defendants. The bill also charged that the Defendants had sold a great number of the shares, and had recouped themselves all sums paid by them in respect of the mine, and that they had now about 800 shares in their possession which were of great value.

To this bill the Defendants demurred for want of equity; because it did not state any agreement that a court of equity could enforce, and did not show that the Plaintiff had any interest which could be the subject matter of agreement; because Plaintiff's remedy (if any) was at law, or against *Fitzgerald* and *Harris* alone; because the bill was uncertain, and did not make it plain whether Defendants were charged as partners or trustees for the Plaintiff; and lastly, for want of *Fitzgerald* and *Harris* as necessary parties.

Mr. *Bunny* and Mr. *Holroyd* for the Demurrer. An agreement to get up a company is not one which a Court of Equity will recognise; nor is such an agreement capable of being the subject matter of a partnership. *Stocker v. Wedderburne* (l), *Bright v. Hutton* (m). Here there was no mutuality between the Plaintiff and the Defendants, and no partnership in law which either party could enforce:

(l) 27 L. J., N. S., Chy., 713.

(m) 3 H. L., Cas., 341.

Hamilton v. Smith (n). *Fitzgerald* and *Harris* are necessary parties in order to carry out the alleged agreement to purchase from them the one-sixteenth share in the entire company, to a share in which the Defendants are entitled if the suit can be maintained at all.

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Mr. *J. W. Stephen* and Mr. *Webb* for the bill. We do not seek any relief against *Fitzgerald* and *Harris*. We are willing to adopt the arrangements ultimately made between them and the Defendants. The Plaintiff's case is that the Defendants being partners in this particular transaction, went behind his back and got the benefit of the renewal, or extension, of the agreement into which the Plaintiff had entered, and to which all the partners were entitled. The Plaintiff has therefore, no equity against *Fitzgerald* and *Harris*, and they would be improperly parties to the suit, if made so: *Alder v. Fouracre* (o). The bill shews that a partnership had been entered into between the Plaintiff and Defendants limited to this one speculation, and such a partnership will be recognised in a Court of Equity: *Dale v. Hamilton* (p). The Plaintiff's equity here is analagous to that of a partner where his co-partner has, without his knowledge, obtained a renewal of a lease formerly held by the partnership: *Olegg v. Edmonsen* (q), *Olegg v. Fishwick* (r). So a partner obtaining any other benefit by virtue of his position as a partner, is bound to account to his co-partner for it: *Beck v. Kantarowickz* (s). The same equity will be administered between persons in a fiduciary relation or position of confidence, the one to the other, even although not strictly partners: *Keech v. Sandford* (t); and in *Hobday v. Peters* (v) Sir *John Romilly* says "I think the evil would be very considerable, and the rule of the Court frittered away by technicality, if it were held that

(n) 28 L. J. N. S., Chy., 404.

(o) 3 Swans, 489.

(p) 5 Hare, 369.

(q) 22 Beav., 125.

(r) 1 Mac. & G., 294.

(s) 3 K. & J., 230.

(t) 1 W. & T. L., C., 36.

(v) 28 Beav., 349.

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the particular relation must be one which the Court designates by a particular name, such as that of trustee and *cestui que trust*, guardian and ward, solicitor and client, or physician and patient." The allegations in the bill, of fraud and contrivance, and secret negotiations between the Defendants and *Fitzgerald* and *Harris* prior to the 17th December, and that the agreement between them was arrived at in consequence of information derived by the Defendants in the course of their confidential dealings with the Plaintiff, are sufficient to maintain the bill upon demurrer.

Judgment.
 —

MR. JUSTICE MOLESWORTH (without calling for a reply):—

The bill sets out an agreement of 5th October, 1868, by which two persons named *Fitzgerald* and *Harris*, who owned a mine at Blackwood, agreed to sell the mine to a company to be formed by the Plaintiff on certain terms, provided he could accomplish the sale before 10th November; and on the same day, by letter, they promised him a commission of £300 for his trouble. This agreement did not bind the Plaintiff to do anything; it was simply that if he did something, he should receive certain benefits. It was substantially that if he would find money, or shareholders to contribute the money within a limited time, he and the shareholders should have certain rights in the mine. The Plaintiff then proposed to the Defendants, *Ditchburn* and *Tarte*, to make a sub-contract with them for forming the company. They sent to investigate the mine, and pending this the Plaintiff stipulated with *Fitzgerald* and *Harris* for some further benefits to himself, in case the company was formed; and this was reduced to writing, by letter of the 22nd October. The Plaintiff and Defendants then agreed that a company should be formed on the basis contained in the letters of 5th October and 22nd October; that Plaintiff should keep half his bargain, and give to the

Defendants half of his rights under those letters. This arrangement also bound nobody to do anything. They might each set about as industriously as they pleased, to get shareholders for the new company, and if either of them procured half the money, he might require from the other, if he found the other half, an equal participation in the profits. Either Plaintiff or Defendants having found half the money, the other party not having found any, might say to the other party, "You have failed in your part, and I will keep all the benefit to myself."

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During the time the agreements with *Fitzgerald* and *Harris* were subsisting, the Defendants told the Plaintiff, that the time for advantageously endeavouring to find shareholders had not arrived, and that the attempt to float the venture must therefore be postponed, and the Plaintiff assented to this. There is no allegation in the bill that these representations by the Defendants were fraudulent, or even untrue or mistaken. The Defendants subsequently advised the Plaintiff to get an enlargement of time for forming the company from *Fitzgerald* and *Harris*. Acting on this advice, he did get an enlargement till 17th December, and he informed the Defendants he had done so.

The bill does not contain any averment of any contract, express or implied, that any further extension of time was to be sought from the owners of the mine; so that the whole relation of the parties was one of contract between the Plaintiff and *Fitzgerald* and *Harris*, which expired on 17th December; and a sub-contract with the Defendants which expired at the same time. As soon as that day arrived all the relations previously existing between the parties ceased; and there is no averment in the bill that any one expected they should last beyond that date.

The grievance that the bill alleges is, that before the contract between the Plaintiff and *Fitzgerald* and *Harris*

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had expired, the Defendants made a new bargain with *Fitzgerald* and *Harris* to form a company and take the mine off their hands; and that they did not disclose the progress of this negotiation to the Plaintiff, but had it ready arranged, so as to act upon it immediately after the 17th December; and the redress which the bill seeks on this basis is to have half of the Defendants' rights under that contract. The case which the Plaintiff makes is quite irrespective of *Fitzgerald* and *Harris*, whom he does not make parties. Now if a person, finding another ready to sell at a certain price, induces a third person to share in the bargain, who afterwards deals for himself and takes advantage of the information thus acquired, however unfair it may be, there is no law to prevent that kind of unfairness. A man has no lien upon any information obtained in that way.

The arguments in favor of the Plaintiff are based principally upon the case of one partner obtaining a renewal of a lease and seeking to retain it to himself, which has been considered as a fraud upon the other partners; and it is said that the partnership is entitled to the accessorial advantage of the renewal. But that principle has never been extended to the case of a person having a bargain for a purchase, subject to fulfilment in a given time. Such a person has no legally recognized property in the probability of the owner extending the time, or after the time has expired, dealing with him, rather than with any body else. Then in addition to that, there is nothing here which could be called a partnership. The relation between the Plaintiff and the Defendants was simply with respect to an existing contract, if that contract should be fulfilled. There had been no expenditure with reference to it, except that of trouble, as to which people who take trouble in reference to a contemplated agreement, without any bargain for being paid for it, simply take their chance of being paid

by the completion of the agreement. There were some small outlays and expenses incurred with reference to it, as to which, perhaps, there might be a contract implied between the parties, that their outlays should be borne in equal shares. A number of people may join in an intended speculation, and incur expenses by publishing advertisements and so forth, but those preliminary expenses form no part of the partnership outlay; and if the partnership is afterwards completed, persons who have incurred those preliminary expenses are not entitled to be paid out of the partnership fund, or by the co-partners. I cannot find that there is any contract, either express or implied, that co-adventurers in a contemplated purchase to be completed within a given time, shall not deal singly with the vendor for a bargain, to come into operation after the original bargain has expired by effluxion of time.

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The supposed equity of the bill is that because the Plaintiff and the Defendants had a right to do a certain thing before 17th December, it was unfair for either of them, without consulting the other, to bargain with the person who was bound down to 17th December, for something to be done after 17th December. There is, I apprehend, no implied inability to enter into such a bargain before 17th December. If the Plaintiff had known that the Defendants were bargaining with *Fitzgerald* and *Harris*, all he could have done would be to complete the bargain of 5th October himself, and if he was in a position to do that he might have done so, and *Fitzgerald* and *Harris* could not have entered into any bargain with the Defendants, so as to defeat their bargain with him. But there is no averment that the Plaintiff could or would have completed his bargain, or have taken half the bargain which the Defendants had made with *Fitzgerald* and *Harris*, if he had been apprised of its existence. He knew that the relation between himself, *Fitzgerald*, *Harris*, and the Defendants was all to determine on 17th December;

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and he had not up to that time, qualified himself to fulfil that contract. Therefore, it completely fell through, and he had not, as far as I see, a legal right to complain of the Defendants afterwards entering into a bargain with *Fitzgerald* and *Harris*; or having previously dealt with *Fitzgerald* and *Harris* before the expiration of that time, for something to be done after that time had expired. On the whole, I think that the demurrer should be allowed with costs, and I will give the Plaintiff a fortnight to amend.

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 —
Appeal.

The Plaintiff now appealed (w) from the order allowing the demurrer.

Mr. *J. W. Stephen*, and Mr. *Webb* for the Appellant, cited in addition to the cases referred to in the Court below: *Carter v. Horn* (x), *Miller v. Mackay* (y).

Mr. *Bunny* and Mr. *Holroyd* for the Respondents were not called on by the Court.

*Judgment on
 Appeal.*
 —

THE CHIEF JUSTICE:—

The facts are fairly stated in this bill, and are comparatively simple. It is the ordinary case of the owners of a mine desirous of disposing of it, and retaining a certain interest in it themselves. They employed the Plaintiff simply as a broker to effect this object. He was employed to sell on behalf of the owners, on certain terms set out in the bill. A time was fixed within which the agreement, if not completed, was to be void. The Plaintiff employed the Defendants, other brokers to assist him, and agreed to share with them the interest which he had in the agreement. As time went on, it was considered by the Defendants inexpedient to

(w) Coram, *Stawell*, C. J.,
Barry, J., and *Williams*, J.

(x) 1 Eq., Ca. Ab., 7.
 (y) 34 Beav., 295.

attempt to form the company, and they suggested that application should be made to extend the time, which was acceded to, and the extended time expired on the 17th December.

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Appeal.*

There are statements in the bill that the Defendants fraudulently made certain arrangements with the owners of the mine, but those general allegations of fraud amount to nothing, unless there are specific facts to sustain them, and the only fact to sustain them is that before the expiration of the time, the Defendants were in communication with the owners of the mine relative to a purchase by themselves, and after the expiration of the time they did purchase. It is said that this is a violation of the rights of a partner, which the Court cannot sanction. In the first place it is going the very utmost length, to dignify this proceeding with the appellation of a partnership. No doubt brokers may be partners, and one broker may enter into partnership with another, with the express object of forming a company under the circumstances of the present case. But here a person employs the Plaintiff to form a company within a certain time, and after that time has expired, the Defendants, whose assistance had been invoked by the Plaintiff, step in and take the matter out of his hands. It may not have been a mode in which one tradesman ought to act to another. It may have been contemptible conduct, but it affords no equity in this Court, which is not a Court of honor, and cannot interfere because one person violates the rules of honor, and acts in a way in which no person, with any sense of fair play, would be disposed to act. To say that the Defendants are guilty of any breach of partnership confidence towards the Plaintiff, appears to be pressing a principle, which in itself is sound, to an extreme which ought not to be done. We think no other decision can be arrived at than that already pronounced, and the appeal should be dismissed with costs.

Appeal dismissed, with costs

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August 27, 28.
October 1.

WEBSTER v. YORKE.

Land was settled to the separate use of a *femme covert* with restraint on anticipation. During her subsequent *discoverture*, she mortgaged to C. & W.

She then remarried, and afterwards borrowed from the Plaintiffs money, where-with C. & W.'s mortgage was paid off.

By deed of 13th November, 1863, W., (survivor of C. & W.) re-

conveyed to the trustees of the settlement, upon the trusts of the settlement; and by deed of 20th November, the *femme covert* and her then husband mortgaged her interest under the settlement to the Plaintiffs. She

subsequently

repudiated the mortgage to the Plaintiffs, as in breach of the restraint on alienation. Upon bill for foreclosure, the Court being satisfied that the release of the old, and the granting of the new security, should be deemed one transaction,

Held, that the *femme covert* purchased by the new deed a benefit to her separate estate; and was seeking to retain that benefit without paying the price she stipulated to pay for it, and should not be allowed to do so; and that she should be held bound by the second deed, so far as she had been bound by the first deed, but no further; and relief to this extent given, but without costs.

BY a post-nuptial settlement dated 7th November, 1850, certain land in Melbourne was, by direction of *Nathaniel Dismore*, conveyed to *Francis M'Donnell*, and *William Nicholson*, in fee, upon trust to receive the rents, &c., and from time to time pay the same to such person as *Jane Dismore*, the wife of the settlor, should appoint, but not by way of anticipation; and in default of appointment, for her separate use, exclusively of her then present or any future husband; with remainders over after her death. By another post-nuptial settlement dated 5th January, 1852, certain land at St. Kilda, was by direction of *N. Dismore*, conveyed to *M'Donnell* and *Nicholson*, in fee, upon the same trusts. On the 14th June, 1857, *N. Dismore* died. On the 31st August, 1858, *Jane Dismore* whilst *discouvert* mortgaged her life interest under these two settlements, to *Norman Campbell* and *W. T. Woods*, to secure payment of £1,000 with interest at 15 per cent, by certain instalments therein mentioned; and covenanted to insure her life for £1,200 and keep up the payment of premiums thereon, as a collateral security. The recital of the settlement in this mortgage, omitted all mention of the restraint on anticipation. On the 3rd February, 1859, *Jane Dismore*, now the Defendant, *Jane Yorke*, married the Defendant, *Charles Yorke*. In November, 1863, there being then £600 remaining due on the mortgage of the 31st August, 1858, Mr. and Mrs. *Yorke*

applied to the Plaintiffs for a loan of £600 to pay off this mortgage, which the Plaintiffs agreed to lend at ten per cent., upon the security of Mrs. *Yorke's* life interest in the settled property, together with an assurance upon her life. The Plaintiffs accordingly advanced £600, with which the mortgage of the 31st August, 1858, was paid off; and by an indenture dated the 13th November, 1863, endorsed on that mortgage, *Woods*, the surviving mortgagee, in consideration of £599 7s. 3d., therein expressed to have been to him paid by *Charles Yorke* and *Jane Yorke* out of the proper monies of *Jane Yorke*, reconveyed all the mortgaged premises to *Nicholson*, as the surviving trustee, upon the trusts of the two indentures of settlement, and discharged of all monies secured by the mortgage. By an indenture of mortgage dated 20th November, 1863, made between the Defendant, *Jane Yorke*, of the first part; the Defendant, *Charles Yorke*, of the second part; and the Plaintiffs of the third part, after reciting the two indentures of settlement as they were recited in the mortgage of 31st August, 1858, and without any mention of the restraint on anticipation, Mrs. *Yorke* with the consent of her husband, in consideration of £600 expressed to have been paid to her by the Plaintiffs, appointed her life interest under the settlements and assigned the policy of insurance on her life to the Plaintiffs, to secure the payment of £600 on the 20th November, 1867, with interest at ten per cent. in the mean time. The Defendant *Charles Yorke*, by this indenture covenanted with the Plaintiffs for payment of the principal money and interest, and of the premiums on the policy of assurance on Mrs. *Yorke's* life; and for insurance of the mortgaged premises against fire. *Nicholson* subsequently died, and the Defendants *Dyson* and *Hood* were appointed trustees of the settlements in the place of *M'Donnell* and *Nicholson*. Default having been made in payment of the moneys secured by the Plaintiffs' mortgage, they applied to be put into possession of the mortgaged premises, and were refused, the Defendants contending that the Plaintiffs'

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mortgage was invalid, as in breach of the restraint on alienation contained in the two settlements.

The Plaintiffs thereupon filed this bill against Mr. and Mrs. *Yorke* and the present trustees of the settlements, alleging that the two indentures of the 13th and 20th November, 1863, were intended to effect that which was the real intention of the parties, viz., to give the Plaintiffs a good and valid transfer of the mortgage of the 31st August, 1858; and submitting that the Plaintiffs, were entitled in equity, to be considered transferees of that mortgage. The bill prayed a declaration that the Plaintiffs were mortgagees of the life interest of Mrs. *Yorke*, for the amount of their advances with interest at ten per cent.; and for foreclosure.

Argument.
 —

Mr. *J. W. Stephen* and Mr. *Holroyd* for the Plaintiffs. The mortgage of the 31st August, 1858, having been executed whilst Mrs. *Yorke* was *discoverte* is valid, notwithstanding the restraint on anticipation, but we admit on the authority of *Tullett v. Armstrong* (a), that the restraint on anticipation revived on the second marriage. The object, however, of the Court in so holding is to protect the separate estate of the wife from the husband and his creditors; and the Court will not by means of the restraint upon alienation enable the husband and wife, conjointly as in this case, to perpetrate a gross fraud. The separate estate, and the restraint on alienation, are equally creatures of Equity, and will be dealt with or modified by this Court, so as to avoid fraud and injustice being committed: *Hulme v. Tennant* (a), *Overton v. Banister* (b), *Vaughan v. Vandersteigen* (c), *Hobday v. Peters* (d), *Nicholl v. Jones* (e), *Davies v. Hodgson* (f).

(a) 4 M. & Cr., 390.

(a) 1 W. & T. L. C., 394.

(b) 3 Hare, 503.

(c) 2 Drew., 165, 363.

(d) 28 Beav., 354.

(e) L. R., 3 Eq., 696.

(f) 25 Beav., 177.

Mr. *Forster* and Mr. *Webb* for the Defendants, Mr. and Mrs. *Yorke*. There is no fraud alleged in the bill or shewn in this case. The mistake, if any, was that of the Plaintiffs' solicitor, who had notice of the settlements, and must be presumed to have known of the clause against anticipation. This is not framed as a suit to rectify the deed on the ground of mistake, but as a bill to redeem, merely. The Plaintiffs, therefore, cannot go into parol evidence to prove mistake or fraud: *Irnham v. Ohild* (g). No fraud is proved, but even if there were, Mrs. *Yorke* as a *femme coverte* could not get rid of the restraint on alienation, even by a fraud upon third persons: *Jackson v. Hobhouse* (h). This Court will not assist the Plaintiffs to improve their security at the expense of the protection which the law throws around married women: *Lassence v. Tierney* (j). There is not here any evidence of mistake. The Plaintiffs got all they bargained for. Under the old mortgage the husband, Mr. *Yorke*, was not liable to any of the covenants. The Plaintiffs got, under the new mortgage, the benefit of his covenants for payment, &c. If this had been framed as a suit to rectify, by making it a transfer of the old mortgage, the husband, Mr. *Yorke*, would be entitled to be released from his personal covenants, but the Plaintiffs do not offer that. As to the argument that the restraint on alienation is the mere creature of equity, and will be moulded by this Court to meet the particular case, that very argument is treated as a fallacy by the Lord Chancellor (*Cranworth*) in *Robinson v. Wheelwright* (k). The fact, if so, that the Plaintiffs' money went to pay off the original mortgage will not give them an equity against Mrs. *Yorke's* separate estate: *Jones v. Harris* (l).

Mr. *Webb* for the trustees, *Dyson* and *Hood*, submitted to act as the Court should direct, and asked for their costs.

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(g) 1 Bro. C. C., 92.
(h) 2 Mer., 488.
(j) 1 Mac. & G., 551.

(k) 6 De G. M. & G., 544, 5.
(l) 9 Ves., 486.

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Mr. J. W. Stephen in reply. *Lassence v. Tierney* is commented on and qualified by *Barrow v. Barrow* (m). We do not ask to rectify, there being nothing to rectify. We ask for the ordinary decree against a mortgagor with foreclosure and sale.

Cur. adv. vult.

October 1.
 —
Judgment.

MR. JUSTICE MOLESWORTH:—

I have felt much difficulty in this case. The facts are—Mr. *Nathaniel Dismore*, in 1850 and 1852, purchased two several properties, and had them conveyed to Messrs. *M'Donnell* and *Nicholson*, as trustees, upon trust, to pay the rents and profits to his wife, *Jane*, to her separate use for life, without power of anticipation, free from the control of him or any other husband. *Dismore* died in 1857. In August, 1858, Mrs. *Dismore* borrowed £1,000 from Mr. *Campbell* and another, upon the security of her life interest, and a policy of insurance for £1,200. The mortgage deed provided for interest at fifteen per cent.; payment of the principal by instalments, the premiums of life insurance and insurance against fire being paid upon the same security, and right to redemption in Mrs. *Dismore*. This mortgage security contained powers of sale, power of paying off principal on notice, &c. Mrs. *Dismore* covenanted for payment. This deed recited the trusts for her separate use, not the clause against anticipation. It has been a matter of doubt, but now may be considered settled—*Tullett v. Armstrong*—that Mrs. *Dismore*, as a widow, had an unrestricted power of disposal of her life interest, but that the restriction would again become operative on her second marriage. In February, 1859, she did marry Mr. *Yorke*. Mr. *M'Donnell* died in 1861. In November, 1863, £600 remained due upon the mortgage to *Campbell*, and Mrs. *Yorke* thought the interest, fifteen per cent.,

(m) 4 K. & J., 424.

too high, and employed Mr. *S. Stephens* as her solicitor to find a lender of £600, to be applied in paying off *Campbell's* representatives, the £600 to be similarly secured, with interest at ten per cent.; and he did find lenders—the present Plaintiffs, Mrs. *Webster*, and Messrs. *McKinnon* and *Youl*—and acted as common solicitor. The transaction was effected, not by a transfer from *Campbell's* representatives to the Plaintiffs, so as distinctly to keep up the old security, but by deeds—one 18th November, 1868—reciting payment by Mrs. *Yorke* out of her moneys of £600 (say), in consideration of which *Campbell's* representatives released and assigned to *Nicholson*, the continuing trustee, the rents and profits payable to Mrs. *Yorke* for life. By a second deed, 20th November, 1868, reciting payment by the Plaintiffs to Mrs. *Yorke* of £600, and an agreement to secure repayment, with interest at ten per cent., out of her life estate, and a policy of insurance for £1,200 (a substitute representing the former policy), her life interest was conveyed to secure the £600 and interest at ten per cent., premiums of insurance, &c., in a great degree similar to the security of 1858, but differing as to the terms of payment; *Yorke* covenanted with the Plaintiffs for payment, &c. The recitals in this deed as to the restriction of the life estate of Mrs. *Yorke* are exactly the same as in the deed of 1858, and I am convinced from them, although it was not stated in the pleadings or parol evidence, that in fact the solicitor or his clerk fell into the mistake of taking the contents of the settlements of 1850, 1852, as truly recited in the deed of 1858, and therefore not discovering the restrictions upon anticipation.

I am satisfied upon the evidence that the release of the old, and the granting the new, security should be deemed one transaction, and that the Plaintiffs' money was virtually applied in paying the £600 due to *Campbell's* representatives. The deed, 20th November, 1868, is obviously in itself inoperative as contrary to the restriction upon

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Judgment.

anticipation, and if the real facts were those stated in it, it would not be binding upon Mrs. *Yorke*, and the Court could not make it binding. *Robinson v. Wheelwright*. She made no misrepresentation, and concealed nothing so as to be treated as fraudulent in the transaction under such authorities as *Savage v. Foster* (n), and it seems doubtful even if her fraudulent concealment would bind her: *Jackson v. Hobhouse*. There are various cases also in which married women have procured considerations by ineffectual conveyances of their separate estates, and have not been held bound to refund those considerations out of their separate estates: *Aguilar v. Aguilar* (o), *Moore v. Moore* (p). So married women generally have been held not bound by acquiescence or arrangements from which they gained or expected advantages: *Nicholl v. Jones*, *Davies v. Hodgson*. What appears to me the peculiar feature of this case is, that Mrs. *Yorke* purchased by the new deed a benefit to her separate estate, the discharge of the old liability, not a sum of money or other consideration, which might be spent by her husband or by herself immediately, contrary to the intention of the clause against anticipation. But I think that in her distinct and restricted character she is seeking to retain a benefit, without paying the price she stipulated to pay for it; and should not be allowed to do so as against the Plaintiffs, or her husband, or the solicitor, in case the loss were to fall upon them.

There is a class of cases in which equity has relieved against conveyances defective from mistake in law as to their effect, referred to in Story, § 136, which might apply if this were deemed a conveyancing mistake of the solicitor fully aware of the fact. And this seems to be the aspect which the bill gives to the case, alleging that the intention of Mrs. *Yorke* and the Plaintiffs was that the old security should be transferred to the Plaintiffs,

(n) 9 Mod., 38.
 (o) 5 Madd., 414.

(p) 1 Coll., 54.

making the advance to pay it off. But I think this case might be represented as upon a mistake in fact, ignorance of the prohibition of anticipation, of which it would be fraudulent for Mrs. *Yorke* to take advantage; but hardly on the present pleading. It might be argued that the deed 13th November, 1863, made *Nicholson* a trustee for the Plaintiffs, and did not extinguish the charge. This bill does not put the case as upon a right in the Plaintiffs to stand in the place of the persons paid off with their money, or ask that relief; but rests rather upon their right to treat the use of the prohibition to alienation as a fraud upon them.

I am at once prepared to hold Mrs. *Yorke* bound by the second deed, so far as regards application of income to interest, &c. Thus I shall not interfere with the restriction upon alienation more than the first deed did; but I hesitate as to enforcing payment of principal, and doubt how I shall deal with her power of redemption. I cannot, I think, charge Mrs. *Yorke* or her estate with the Plaintiffs' costs, and I think I should indemnify her, and it, from her trustees' costs, by making the Plaintiffs pay them. I cannot punish her litigiousness by charging her estate in anticipation for costs: *Moore v. Moore*.

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" Declare that the Plaintiffs are entitled to a charge on account of
" their advances of £600 in bill mentioned, and for premiums on
" the policies of life insurance in bill mentioned, and insurances
" against fire upon the life interest of the Defendant, *Jane Yorke*, in
" the rents, issues, and profits of the hereditaments comprised in the
" indentures of settlement in bill mentioned remaining in the Defen-
" dants, *William H. Dyson* and *John Hood*, as trustees thereof, but so
" as not to interfere with the rents, issues, and profits, by way of
" anticipation, more than *William Thomas Woods* in bill named might
" have done if he had not been paid off. Refer it to the master
" to take an account of the sum remaining due to the Plaintiffs on the
" said advances, premiums, and interest, continuing the account to his
" report. Order the Plaintiffs to pay the costs of the Defendants
" *William H. Dyson* and *J. Hood* up to this decree. Refer to tax.
" Let the Plaintiffs and Defendants *Charles Yorke* and *Jane* his wife,

Decree.

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" abide their own costs up to this decree. Let the Defendants, "
W. H. Dyson and John Hood, pay the Plaintiffs the clear proceeds
 " of the said rents, issues, and profits now in their hands, or which may
 " come to their hands on account of interest and premiums of life and
 " fire insurance until otherwise paid or further ordered, without
 " prejudice to the question of the right to raise the principal debt, and
 " the application of the proceeds of the last policy of insurance in the
 " bill mentioned. Reserve further directions and future costs. Liberty
 " to apply."

June 1, 14, 22.
 September
 18, 21, 22.
 October 4.

REEVES v. CROYLE.

A mining company, registered under No. 228, and mining on land alienated from the Crown, was ordered to be wound-up. The official agent filed a bill against the directors and manager, charging misappropriation by them of the company's gold and other assets; the concealment or mutilation of the company's books; and the improper payment of dividends out of borrowed money, and not out of profits. Prior to the winding-up order, the company had been sequestrated by order of the Supreme Court in Equity for breach of an injunction. On demurrer,

SUIT by the official agent of the Webster-street Freehold Gold-Mining Company Registered incorporated under the "*Mining Companies Limited Liability Act*," No. 228, 15th October, 1867, and ordered by the Judge of the Court of Mines at Ballarat, to be wound up under that Act, 27th July, 1868, against *James Croyle, Martin Bade, R. S. Mitchell, Robert Ditchburn, John Hunt, J. V. Turt, and Alexander Fenton*, as Directors, and *J. L. Fenton*, as Manager of the company.

The case made by the bill was that the company's mines proved very valuable, and large quantities of gold were obtained therefrom by the Defendants, far more than sufficient to cover the legitimate working expenses of the company, but nevertheless the company's account with its

Held by the full Court, affirming *Molesworth, J.*, that under No. 324, sec. 6, the official agent was entitled to sue in his own name, as representing the company; that the sequestration was no bar to his suing, the assets of the company not having come to the possession of the sequestrators; that the sequestrators were not necessary parties; and that the Attorney-General, as representing the Crown, was not a necessary party.

Held by the full Court, reversing *Molesworth, J.*, that the shareholders who had received the dividends alleged to have been improperly paid by the directors, were not necessary parties.

bankers was constantly overdrawn, and the company was, at the time of the winding-up, largely indebted to other creditors. That the Plaintiff had applied to the Defendants for accounts of the proceeds of the gold extracted from the company's mines, and their application; but the Defendants had neglected and refused to furnish such accounts, alleging that the company's books had been lost or mislaid; and the bill charged that portions of the gold, or its proceeds, had been appropriated by the Defendants to their own use, and other portions misapplied, and the books of the company destroyed or concealed by the Defendants to prevent the account being obtained, and to defraud the creditors and shareholders of the company. That the Defendants declared and paid dividends when the company's account with its bankers was overdrawn, and which were paid, contrary to the provisions of the Deed of Association, not out of profits or receipts, but out of moneys borrowed by the Defendants from the bank in the name of the company for that purpose. The bill then stated certain actions by *Charles Seal* and others, in which verdicts had been obtained against the company; and a suit by *Charles Seal*, in which an injunction was obtained against the company, and a writ of sequestration for breach of it; and alleged that the property of the company having been, in the meantime, made away with by the Defendants, the sequestrators were unable to obtain possession of any part thereof, and the commission proved unavailing. The bill then alleged a judgment obtained by the bank by collusion with the Defendants against the company for the amount of their overdraft; and that under it the whole of the plant and claims of the company were sold at an undervalue before judgment could be signed upon the verdicts of *Seal* and others. That the Defendants, to escape liability upon their shares, had fraudulently transferred their own shares into the names of other persons, and had then declared such shares, with many others, forfeited for non-payment of calls, without having taken any steps to recover the calls, which were still owing, but in

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consequence of the forfeiture and the subsequent mutilation or concealment of the company's books, could not now be recovered. The bill charged that in procuring such sale of the company's property by confession of judgment, and in the forfeiture of shares, and in the transfer of their own shares into the names of fictitious or non-consenting nominees, the Defendants conspired together to defraud the creditors of the company, and to deprive *Seal* and others of the benefit of the verdicts obtained by them, and to defeat the sequestration; and the Plaintiff submitted that the Defendants were accountable for the difference between the price realised for the plant, &c., sold by the sheriff, and its actual value; and also for all calls owing in respect of the forfeited shares, or at any rate in respect of such of them as were then standing in the name of any nominee of the Defendants. The bill then averred a sale by the Defendants of certain freehold land of the company to another mining company, the Great Northern, which sale was not sanctioned by the shareholders as required by the company's deed of association, and the proceeds of which sale were not accounted for by the Defendants. That other freehold land of the company had been sold by the Defendants without authority, to the Defendant *J. L. Fenton*, the manager, at a gross undervalue, and that *J. L. Fenton* had, since his purchase, extracted a large amount of gold from the land and retained it for his own use. The bill then specifically alleged that during Saturday, 30th May, 1868, and Sunday following, the Defendants, with the object of defrauding the company's creditors and shareholders caused the puddling machines of the company to be cleaned; and the washdirt which was taken therefrom containing upwards of 500 ounces of gold, together with a large quantity of candles and other stores, being the whole of the stores then belonging to the company, to be deposited in the house of the Defendant *J. L. Fenton*, who had since, with the knowledge and consent of the other Defendants, sold or otherwise disposed of the gold and stores; but the Defendants refused

to furnish any account of the gold and stores, or of their proceeds. That the Defendants were in the habit of making gifts to various persons and charitable institutions, and also to each other out of the company's funds; and had paid out of the same funds to the chairman and manager and others of their number, various sums for expenses incurred or alleged to be incurred in the actions and suit before mentioned, which were occasioned by the wrongful acts of the Defendants, and to which there was no just defence; and submitted that the Defendants respectively ought to refund with interest all monies so received by them respectively or improperly paid to other persons. That the Defendant *J. L. Fenton* frequently received cheques upon the company's bankers for the purpose of discharging debts of the company, which he afterwards settled by his own cheques for less than the full amount, or partly paid in kind out of the company's stores, and with the permission of the other Defendants kept the balance. The bill also charged that the Defendants or some of them, with the permission of the others, had mutilated or destroyed divers of the books and papers of the company, and concealed others; and had in their possession, custody or power, divers books, deeds, or other documents belonging to the company, or relating to the matters aforesaid, or some of such matters which the Defendants had neglected and refused to deliver to the Plaintiff, and owing to the want of such books the Plaintiff had been unable to recover a call duly made by him upon the shareholders of the company since the date of the winding-up order; and sought discovery of all such books, &c.

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The bill prayed for an account of all gold extracted from the company's mines, and its application; an account of all dividends paid out of monies borrowed by or on behalf of the company; and that it might be declared that the Defendants were bound to refund to the Plaintiff,

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as official agent, the amount of all such dividends with interest at the rate charged by the lenders, from the respective times when the funds were appropriated for payment of the same. That it might be declared that the Defendants were liable for all calls owing in respect of the shares so forfeited as aforesaid, or at any rate in respect of such of the same shares as were then standing in the names or name of any nominees or nominee of the Defendants or any of them ; and that if necessary, an inquiry might be directed as to the number of such shares, and the amount of calls due in respect thereof. That it might be declared that the Defendants were liable to the Plaintiff for the difference between the price realized for the property of the company sold under the execution, and its actual value, with interest. That the sale of land to the Defendant *J. L. Fenton* might be set aside, and he decreed to convey the land to the Plaintiff as official agent. That it might be declared that the Defendants were liable for the full value of the land sold to the Great Northern Company, with interest. That the Defendant *J. L. Fenton* might be restrained from further working or washing the auriferous soil of the land sold to him ; and for an account of all gold obtained by him from such soil, and that he might be declared liable to the Plaintiff for the same. For an account of all stores belonging to the said company which were deposited with the Defendant *J. L. Fenton*, and of the value thereof ; and that the Defendants might be declared liable to the Plaintiff for the value of all such stores, which were not legitimately applied for the use of the Company. That the Defendants respectively might be declared liable to make good to the Plaintiff all moneys received by them respectively, or improperly paid to other persons out of the funds of the company by way of gift, or for expenses incurred in the actions and suit before mentioned with interest ; and for an account of all such monies. That the Defendant *J. L. Fenton* and the other Defendants,

on his default might be declared liable for all balances of the company's money received by him for payment of its debts in excess of the debts paid by him; and for an account of such balances.

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To this bill all the Defendants demurred on the following grounds:—(1) Want of equity. (2) That the Plaintiff, as official agent, was not entitled to institute the suit. (3) That by reason of the sequestration order no part of the estate or effects of the company passed to the Plaintiff under the winding-up order, and therefore he had no interest in the subject matter of the suit. (4) That the commissioners under the sequestration and *Charles Seal* were necessary parties. (5) That all the shareholders in the company, or at all events such of them as received the dividends alleged to have been improperly paid, were necessary parties. (6) That the Attorney-General was a necessary party.

Mr. *Bunny* and Mr. *Webb* for the demurrer. The Plaintiff is official agent of the Ballarat mining district, and as such, is charged with the winding-up of this company; but his powers are limited by the Act No. 228, as enlarged by the Act No. 324. It is his duty to administer the estate and effects vested in him by the Act, but he has no power to rip up the whole anterior proceedings of the company, and as in this case seek an account of all the receipts and disbursements of the company from its very commencement; and he has no right to saddle the company with the costs of such a suit. Any relief the Plaintiff, as official agent, is entitled to should be by proceedings in the Ballarat Court of Mines in the matter of the winding-up, and not in this Court. *In re The Plumstead, &c., Water Company* (q), *In re The General International Agency Company Limited* (r). The Act No. 324, vests all the estate and effects of the company

(q) 29 L. J., Chy., 741. (r) 34 L. J., Chy., 387.

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in the official agent, who has the like remedy to recover the same as the company might have had. This would enable him to sue a stranger, but gives him no right to interfere between the shareholders *inter se*, and as on behalf of one section of shareholders to sue another section of shareholders, *i.e.*, the directors. By the 11 and 12 Vic., cap. xlv., sec. 29, all the property of a company being wound-up under that Act is vested in the official manager, and by the same Act, sec. 50, all suits which might have been prosecuted by or on behalf of the company before being wound-up may be prosecuted by the official manager. But, nevertheless, in *Ernest v. Weiss* (s), it was held in the case of a company being wound-up under that Act that the official manager could not maintain a suit against the committee of management of the company to make them liable for funds alleged to have been misapplied by them; and in *The Official Manager of the Grand Trunk Railway Company v. Brodie* (t) a doubt is expressed whether such a suit could be sustained.

The bill alleges a prior sequestration against the company, and under that all the estate and effects of the company was vested in the sequestrators; and the present Plaintiff took nothing under the winding-up order, and therefore has no interest to maintain this suit. All choses in action pass to sequestrators: *Wilson v. Metcalf* (v). The subsequent winding-up order did not divest the estate from the sequestrators, for *Tatham v. Parker* (w) shews that a discharge under insolvency will not defeat a sequestration. The sequestrators, therefore, if anybody, are the persons entitled to institute this suit. At all events, they and *Seal* should be parties in order to litigate the question; and the Court will not decide against their rights in their absence.

(s) 2 Dr. & S., 561; 32 L. J. Ch., 113.
 (t) 9 Hare, 823.

(v) 1 Beav., 270.
 (w) 1 Sm. & G., 506.

The Plaintiff has no right to any relief as to the dividends alleged to have been wrongly paid. So far as the shareholders are concerned no case is made for the repayment by the directors of dividends already paid to the shareholders; and so far as the Plaintiff represents the creditors, it does not appear but that there may be uncalled capital more than sufficient to pay all the debts, and which the Plaintiff could recover from the shareholders. The improper payment of dividends is not a ground for the institution of such a suit as the present by the official agent: *Turquand v. Marshall* (x). At all events, the directors are entitled to have the shareholders to whom the dividends have been paid made parties to the suit, in order that they may get contribution from them of the amount of dividends received by them: *Lund v. Blanshard* (y), *Williams v. Page* (z).

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The Plaintiff seeks by his bill an account of gold removed from land alienated from the Crown. This is the property of the Crown, and the Attorney-General is therefore a necessary party: *Millar v. Wildish* (a).

Mr. J. W. Stephen and Mr. Holroyd for the bill. In those cases where it has been held that the official liquidator could not sue as representing the company being wound up, the company was unincorporated, and it was held that the official liquidator could not sue as representing some of the shareholders against the others. But this company was incorporated, and might as a company have maintained a suit against the directors to make them account for their misfeasances; and by the Act No. 324, sec. 6, the official agent has "the like remedy to recover the estate and effects of the company in his own name, as the company might have had if such order" i.e., the

(x) L. R., 6 Eq., 112.
(y) 4 Hare, 9.

(z) 24 Beav., 654.
(a) 2 W. & W., Eq., 46.

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winding-up order "had not been made." He is therefore entitled to maintain this suit in his own name.

The sequestration order had not the effect of vesting the estate of the company in the sequestrators; and any part of the estate not actually in the possession of the sequestrators passed to the Plaintiff. In *Tatham v. Parker* the sequestrator was actually in possession. Here it is alleged that the sequestrators never obtained possession of anything. Besides which all the proceedings in the sequestration were stayed by the winding-up order, by virtue of No. 824, sec. 6, which enacts that when any order for winding-up a company is made, all actions, suits, and proceedings then pending against such company shall be stayed, and further execution of any judgment or decree thereupon obtained against such company shall be stayed.

The objection that the shareholders are necessary parties is not so much an objection for want of parties, as for want of equity. It would be impossible to make them all parties, and it would be a practical denial of the Plaintiff's equity to require them to be made parties. [*Molesworth, J.*—If any part of the relief sought cannot be obtained in the absence of any parties, that is a good objection for want of parties. It may amount to this, that you cannot get that relief, but must amend your bill by striking out the prayer for it.] In *Evans v. Coventry* (b), directors were made responsible for dividends improperly paid, and the shareholders were not made parties to the suit. There the decree was made without prejudice, which may be done in this case if desired. In a creditors suit against executors alleging the improper payment of legacies before payment of debts, the Defendants cannot require the legatees who have been paid, to be made parties.

(b) 8 De G. M. & G., 835.

The Attorney-General is not a necessary party, for this is only a suit between the parties who have rightly or wrongly removed the gold, *inter se* for an account of that gold. The Defendants are liable as trustees of that gold and cannot set up a *jus tertium*. The only cases where the Attorney-General has been held a necessary party have been in cases of trespass.

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Mr. Bunny in reply.

Our. adv. vult.

MR. JUSTICE MOLESWORTH:—

June 22.
Judgment.

This suit is by the official agent of the district of Ballarat, against the directors of the Webster-street Freehold Gold Mining Company, which was incorporated, and afterwards ordered to be wound-up, under the Act 228.

The bill attributes various acts of misconduct, the Defendants receiving more funds than they accounted for, refusing to account with the Plaintiff, having destroyed their account-books to conceal their contents, having caused losses by various misconduct to others, and mismanagement. It seeks accounts, declaration, and enforcement of liability.

The Defendants have demurred on various grounds—first, for want of equity; and secondly, that the Plaintiff, as official agent, is not entitled to institute this suit. By the Act No. 228, sec. 27, the official agent has power to collect all debts owing to the company, and by No. 324, sec. 6, all the estate and effects of the company are vested in him, to be disposed of according to law, and he has the like remedy to recover the estate and effects of the company in his own name as the company might have had if such order of winding-up had not been made. The company clearly had a right to recover property in the hands of its directors as

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trustees or agents for it, and the complexity of the accounts and suppression of the account-books would have entitled it to resort to a Court of Equity. The official agent is placed by No. 324 in its position, and may sue as for himself, not saying in terms that he sues on behalf of the company: *Williams v. Page, Turquand v. Marshall*. The difficulty which occurred in that case as to part of the relief, and in *Ernest v. Weiss* to the whole of the relief, namely, that the official agent could sue only where the company could have sued, and a partnership could not sue its individual members, rested upon the respective companies in those cases not being incorporated. The Acts would operate as an extinguishment of clear lawful liabilities if an official agent could not sue. No. 324, sec. 6, giving the official agent like relief as the company, must of course include relief in all Courts where the company might have sought it.

The third ground of demurrer is based upon statements in this bill, that Mr. Seal had sued the company in this Court, obtained an interlocutory injunction against a nuisance caused by it, which was violated, and thereupon Seal obtained a sequestration against the property of the company for contempt; but that the property of the company having been made away with by the Defendants, the sequestrators were unable to take possession of anything. The ground of demurrer is that all the property of the company was divested. A sequestration has no such effect; it imposes a liability on the property of the person or company against whom it issues, but leaves the right of property subject to that liability untouched.

The fourth ground of demurrer is that Seal and his sequestrators have not been made parties. I have not been referred to any authority for the necessity or propriety of making a creditor who has obtained sequestration, or the sequestrators, parties to suits against the persons

affected by the sequestration, even where the sequestrators are in possession. Courts of Equity do not permit the possession of sequestrators to be disturbed without leave, and have assumed a jurisdiction as to granting that leave, investigating the rights of the person seeking it, whether they are fairly superior to those of the sequestrating creditor. Here the sequestrators are in possession of nothing, seeking nothing—in fact, I think, as between the Plaintiff, and *Seal* and his sequestrators, that the sequestration is stopped by the earlier part of the same section, 6, of No. 324.

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The fifth ground of demurrer has reference to parts of the bill about improper payments of dividends. The bill states that by the company's deed dividends should be declared out of the profits only, and not out of the capital of the company, nor out of any advance or overdraft. That the defendants declared and paid dividends to the shareholders when the company's bank account was overdrawn, not out of profits, but out of money borrowed from the bank in the name of the company for the purpose; and it prays an account of such dividends, and repayment of them by the Defendants to the Plaintiff. This bill says nothing as to the prospects of solvency of this company—whether its other assets will fully pay its debts, whether moneys leviable under the clear liabilities of the shareholders to calls within the limited liability, will do so. I could imagine cases in which dividends were intended to be applied to pay calls, so as to give a fictitious appearance of capital being paid up, against which creditors might have redress through an official agent. The fraud of false credit produced by fictitious dividends is upon individuals dealing in shares, not upon the company itself, so that the official agent could not sue for it: *Turquand v. Marshall*. But I cannot see, generally, how either a company or its shareholders are legally injured by an improper declaration of a dividend, and I would be disposed to hold this bill demurrable for

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want of equity as to that part of it. But the fifth ground of demurrer is for want of parties, the several shareholders of the company, or, at all events, such of them as received dividends. I have been referred to *Lund v. Blanshard*, *Evans v. Coventry*, and *Williams v. Page*, as to the right of directors having improperly made payments, to have as Co-defendants the persons to whom the payments were made. I find it hard to apply such reasoning to a case where I see no reason to charge the directors; but say that if, in any aspect, the directors are liable as to dividends, the bill presents no grounds for saying that they should be left to bear that liability as primarily theirs. I therefore allow the demurrer on that ground.

The sixth ground of demurrer is that it appears by the bill that the mining operations of the company were on private property; therefore the gold, of which an account is sought, is Crown property; therefore the Attorney-General should be a party. In *Millar v. Wildish* I had to consider the question whether an owner of private property, if entitled to an account of gold taken by trespassers from it, should make the Attorney-General a defendant, and I left it undecided; but in the present case, the company is formed and carries on operations—mining under private property—that is the common object of shareholders and directors; and I do not think, as to enforcing liabilities between themselves, either should be embarrassed by the fact that both are liable to be treated as trespassers by the Crown. No one ever heard, in a suit as to the profits of land by persons who have dealt about it as theirs, that the suit is defective for want of parties, namely, persons who having title to the land paramount to the litigating parties, remain quiescent, and might possibly make them both liable as trespassers.

I allow the demurrer for want of parties upon the fifth ground only. I overrule the demurrer upon all other

grounds. I give leave to the Plaintiff to amend his bill within a fortnight, either by striking out the statement and prayer of relief as to dividends, or by adding parties, with statements to show them fit. I leave the parties to abide their own costs of demurrer.

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Appeal.

From this judgment the Plaintiff appealed to the full court (c).

Mr. J. W. Stephen and Mr. Holroyd, for the Appellant, cited in addition to the cases cited below, *Mars v. Malacki* (d), *Turquand v. Marshall*, on appeal (e), *McDougall v. Jersey Hotel Company Limited* (f), and *Pennell v. Deffell* (g).

Mr. Bunny and Mr. Webb for the Respondents, cited, besides the cases cited below, *In re The Exeter & Crediton Railway Company* (h), *In re The Cork & Youghal Railway Company* (j), *Bailey v. Birkenhead, & Co., Railway Company* (k), and *Stringer's Case* (l).

Our. adv. vult.

THE CHIEF JUSTICE:—

October 4.
Judgment on
Appeal.

Demurrer to a bill against directors of a mining company on several grounds, all of which were over-ruled except one; that the shareholders to whom certain dividends, or so called dividends, had been paid by the directors out of money improperly borrowed by them on the credit of the company were necessary parties to the suit. [His Honor stated the substance of the bill, as above set out, and proceeded:—] The company is now virtually insolvent,

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| (c) Coram, <i>Stawell</i> , C. J., | (g) 4 De G. M. & G., 372. |
| <i>Berry</i> , J., and <i>Williams</i> , J. | (h) 5 Ry. Cas., 215. |
| (d) 1 Myl. & Cr., 575, | (j) 4 W. N., 142. |
| (e) L. R., 4 Chy. App., 376 | (k) 12 Beav., 433. |
| (f) 2 H. & M., 528. | (l) L. R., 4 Chy., App., 487. |

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is being wound-up, and the official agent by this bill against the directors treats them as wrong-doers, as having been guilty of a breach of trust, and seeks that, amongst other things, they may repay these monies which under the name of dividends, they have paid from sums borrowed from the bank in the name of the company. The decision that the shareholders are necessary parties, necessarily implies that if all were made parties, the official agent would be enabled to recover these dividends either from the directors or the shareholders, or from both; because it would be quite unnecessary to subject the Plaintiff to the enormous delay of bringing the shareholders before the Court, merely that the bill should be dismissed as against them. Unless the Court was clearly of opinion that this equity could be enforced, it would be incumbent not to convey an opinion inferentially that it could, provided certain absent persons were made parties. We do not think, however, that in holding the shareholders are not necessary parties we are called on to express any opinion that this alleged equity could be enforced. It is only one of several, and the Court cannot on demurrer, strike out any portion of the bill. Although in holding that these shareholders ought to be before the Court, we should inferentially express our opinion that if they were, this particular equity could be enforced; it by no means follows that in saying they are not necessary parties, we say that the equity can be enforced. We desire to avoid expressing any opinion upon the case, further than that we have no hesitation in saying that if this equity cannot be enforced against the directors without the shareholders being parties, neither can it be enforced with them as parties. We think the shareholders are not necessary parties, and that the demurrer, as regards that point also, ought to have been over-ruled, and the Defendants called upon to answer the bill. What effect the answer or the evidence may have is another matter.

It was urged, however, in the nature of a cross appeal, that the present Plaintiff was not the proper person to sue, and that even if he was, the sequestration prevented his suing. We think the Act itself determines the first point. It enacts that the "estate and effects" shall vest in the official agent, and we think those words are sufficiently large to enable him to bring this suit. He is bringing the suit for various claims, some of them unquestionably within that enactment; and it is not necessary for us to determine now that all of them are. As regards some, the Plaintiff may find himself embarrassed in sustaining his equity; but we have no hesitation in saying that as regards others, they fall within the words "estate and effects," which vested in him, and as to those, he can maintain this suit.

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It was urged lastly that the sequestration was a bar to the suit; that the "estate and effects" said to have vested in the official agent had already previously vested in the sequestrators, as they can recover choses in action. But we think the case of *Payne v. Drew* (m) determines this point. There a sequestration had been obtained. The sequestrators for some reason had, as in this case, slumbered. A writ of *fi. fa.* was issued, and returned by the sheriff *nulla bona*. But it was held that such a return was no answer; there may have been goods belonging to the Defendant not in the possession of the sequestrators, and those goods ought to have been seized by the sheriff. In other words, the sequestrators, by their laches, may enable persons in whom the estate and effects of the Defendants may have subsequently become vested, to recover goods or choses in action, which the sequestrators, if they had been more on the alert, might themselves have recovered. In that case all the authorities were reviewed, and it was held that the sequestration by no means decided whether there were any goods or not.

(m) 4 East., 523.

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 —
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 Appeal.*

We think, therefore, the appeal should be allowed; the costs follow as of course. We over-rule the demurrer with costs, and give six weeks' time to answer. The deposit to be returned.

MR. JUSTICE BARRY:—

I concur in the views expressed by His Honor the Chief Justice, and in so doing leave the ultimate determination of the subject in contest completely open. The bill complains of a breach of duty on the part of the directors, and the Plaintiff seeks to pursue his remedy against them; but he does not charge fraud against the shareholders as well as the directors. The shareholders may have been perfectly innocent, and absolutely ignorant of the mode by which the directors obtained the funds to pay these dividends; and the only object of making them parties would be to give the directors an opportunity of getting back from them the monies which the directors, it is said, improperly paid to the shareholders, that is to get the benefit of a cross suit. But the Plaintiff does not seek a restitution in specie of this money. The case would be otherwise if it were a chattel, or debentures, or bonds, and the Plaintiff charged collusion between the shareholders and the directors, and sought to obtain restitution of the chattel in specie. But I conceive it would be unnecessary to join them here.

With respect to the sequestration, the bill properly mentions it as a fact, but it shews that the sequestration never attached to this property, because by the alleged fraudulent act of the directors, the property was dissipated and disposed of before the sequestration could attach to it.

There is another objection by the demurrer as to the necessity of making the Attorney-General a party. This question has arisen in two or three cases cited at the bar. It strikes me the present case is totally different from

either of those alluded to. In a case of alleged trespass and removal of gold, the Defendant may say I admit I was a trespasser, but the gold belongs not to you, but to the Queen. In such a case as that it may have been correctly held that the Sovereign must be represented by the Attorney-General. But this case is an alleged misappropriation of property after it has been won from the soil and converted into money; it is a breach of trust, and admitting the propriety of the decisions in the cases alluded to, the principle laid down in them is not applicable to this case. Therefore, I think, on this point the demurrer has been properly over-ruled, and that there was no occasion to make the Attorney-General a party.

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MR. JUSTICE WILLIAMS concurred.

IN THE MATTER OF THE WILL OF ANNE NEESON

Oct. 7, 11.

ANNE NEESON made her will, dated 17th March, 1869, by which she directed her trustees to convert her personal estate, pay debts, and divide the residue into seven parts; to pay four parts to her four adult children, and the other three to her three infant children on their coming of age, and in the meantime to invest the infants' shares and apply the annual income to their support and maintenance. She devised her real estate upon trust to sell when her youngest child came of age, and to divide the proceeds between all her children then living, and until sale to apply the whole of the net rents in maintaining and educating the children under age. There was no advancement clause. Probate was granted 15th April, 1869. The testatrix left four adult and three infant children aged

Real and personal estate was given upon trust for conversion for the benefit of three infants, the proceeds to be paid them on their attaining majority, and the income in the mean time applied for their maintenance. Each infant's share in the personalty amounted to about £250, and the entire realty produced a rental of only £1 a week. Application for liberty to pay out of *corpus* a sum in aid of maintenance, and a premium of £50 as an apprentice fee with one of the infants, refused.

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eighteen, sixteen, and fourteen, who were then unable to maintain themselves. The real estate was let for about £1 per week, but the rents afforded precarious and insufficient provision for the infants' maintenance. The personalty was of the value of £1,800, or thereabouts

It was proposed, in accordance with the wishes of the family and of the acting trustee, to apprentice the infant son aged fourteen, to an engineer, for which a premium of £50 was required, and to allow fifteen shillings a week for the maintenance of each of the infants in addition to the rents of the real estate.

Argument.

Mr. *Holroyd*, on behalf of the infants, who appeared by their eldest brother as next friend, moved for an order authorising the proposed expenditure out of the infants' shares in the personalty, and referred to *Ex parte Chambers* (n), *Prince v. Hine* (o), and *Barlow v. Grant* (p).

Cur. adv. vult.

October 11. MR. JUSTICE MOLESWORTH:—

Judgment.

This is an application for liberty to the acting executor to make an advance of £50 to an infant son of the testatrix, wherewith to have him apprenticed to a trade; and for all the children to have advances made out of the corpus of the property for the purpose of maintenance.

I may say generally, that when people make their wills and are aware of the circumstances of their children, they are far better judges than I can possibly be of the probabilities of their children finding support from their own exertions or otherwise; and I have very little disposition

(n) 1 R. & M., 577.

(o) 26 Beav., 634.

(p) 1 Vern., 255.

to interfere with the provisions of any will in a matter of this kind. Those provisions may be wise or the reverse, but I am not at all disposed to introduce a system by which this Court should say that a testator ought to have done something more for the maintenance of his children than he has done. There is one authority which has a considerable resemblance to the present case—*Ex parte Chambers*—decided by Lord *Lyndhurst*, but it does not seem to have been followed in subsequent and more modern cases. There, there was an express provision for advancement, so that the will did not regard the corpus of the property there with the same sanctity as the present will appears to do. What the Court actually did in that case was to give liberty to the executors to apply the sum of £25 on account of the son, and £20 on account of each of the daughters towards their “maintenance, education, and advancement in the world,” the will itself authorising an “advancement.” I do not in this case, think I should be warranted in making the order sought.

1869.
In re
NEESON.
Judgment.

As to the boy, there is an application which would be entitled to more serious consideration, viz., for an advancement of £50 to apprentice him to the particular trade of an engineer. That business is a trade in which an apprentice fee is ordinarily demanded, but I am not to suppose that in all trades such a fee is required; and I do not see why in this particular boy's case the direction of his mother's will is to be departed from in order to confer this supposed advantage on him. On the whole it is an application which I do not feel myself warranted in granting.

Motion refused.

1869.

October 18.

The incidental effect of a decree upon other property of the unsuccessful litigant, not directly affected by the suit, cannot be considered in order to make up the appealable amount to entitle him to appeal to the Privy Council.

WAKEFIELD v. PARKER.

LAND having a frontage to Caroline-street, South Yarra, was subdivided into small allotments, one hundred feet deep, and thirty feet wide, bounded at the rear by a private road or right-of-way fourteen feet wide, running parallel with Caroline-street into Shipley-street, a street at right angles with Caroline-street. *Parker* was the owner of lots 13, 14, 15, 16, 18, 19, 20, and 21, and Mrs. *Wakefield* of lot 17 subject to a mortgage by her. The private road into Shipley-street, divided all these lots from other land belonging to *Parker* of considerable value, and in October, 1863, by deed between Mrs. *Wakefield* and *Parker* she gave up her right-of-way over the road at the rear of *Parker's* lots in consideration of his giving up his right-of-way over the road at the rear of her lot, in order that each might occupy the land over which the right-of-way was extinguished. At the same time *Parker* agreed to sell to Mrs. *Wakefield* lot 16 for the sum of £100; she agreeing to give a right-of-way twelve feet wide out of lot 16, to the owners and occupiers of lot 17. Lot 17 was afterwards sold by Mrs. *Wakefield's* mortgagee.

Differences having arisen between Mrs. *Wakefield* and *Parker* as to the depth of the right-of-way to be reserved out of lot 16, she filed a bill for specific performance of the agreement offering to grant a right-of-way sixty feet deep. *Parker's* answer insisted that the right-of-way should be 100 feet deep, the whole depth of the allotment. By the decree of Mr. Justice *Molesworth*, dated 29th June, 1869, he declared that the right-of-way should be 100 feet. On appeal by the Plaintiff, the full Court declared that the right-of-way should be to a point affording the most direct access to lot 17, round the north-west angle of the building erected on such lot at the date of the agreement (which

would be about sixty feet from Caroline-street) ; the costs of the suit and appeal to be paid by the Defendant.

The Defendant now moved for leave to appeal to the Privy Council, under the Orders in Council. His affidavit contained the following statement as to the value of the property involved :—"The owner of lot 17 has required me to give him a right-of-way over a strip of land twelve feet wide on lot 16, running along the entire boundary between the said lots 16 and 17, which I am unable to do in consequence of the said judgment in the matter of the appeal ; and he threatens and intends, unless the demand be complied with to re-open the rights-of-way which he is entitled to use, which lead to and across the rear of lot 17 from Shipley-street, and which said rights-of-way have been closed by arrangement between me and the Plaintiff, as proved in the suit. The re-opening of the said last mentioned rights of way would necessarily have the effect of depreciating and injuring my property in the vicinity of the said lots 16 and 17, to an extent exceeding £500." The Plaintiff filed an affidavit in reply, containing the following statement :—"The subject matter of litigation in this cause is not worth the sum of £500, and I say that I am ready and willing to sell all my interest under the contract in the pleadings mentioned, to the Defendant for the sum of £300."

Mr. *Holroyd* for the motion. The judgment affects property of the value of £500, although the property which the Plaintiff seeks by the suit, is admittedly of less value. The right-of-way which she refuses to give up is of that value to the Defendant, on account of the injury he will sustain if he does not get it. [*Molesworth, J.*—Have you any right to consider the value to him irrespective of actual value in bringing the case within the Orders in Council ?] *Ex parte Rolfe and Bailey (q)* shews that the Defendant has a right to do so. The measure of loss

(q) 2 W. & W., I.E.M., 51.

1869.
WAKEFIELD
v.
PARKER.
—
Statement.

Argument.

1869.
 WAKEFIELD
 v.
 PARKER.
 —
Argument.

to either party is the test of value. The Plaintiff here is under no obligation to sell, and it is no answer to say that she is willing to relieve the Defendant from the loss occasioned by the decree by selling him something for less than £500. The question is: does the decree injure his property to that extent, and it is not denied that it does.

Mr. J. W. Stephen, contra. The language of the Orders in Council, though far from clear, cannot be construed to include any claim affecting property of the value of £500, unless the claim or right itself is of that value. The question raised in the suit is as to the extent of an exception from property which is not worth £500, and may be bought for £300. The Defendant at the bar expressly disclaimed making any claim to the extended right-of-way, on the ground of his being the owner of adjacent property, to which it would afford access. He cannot assert the claim now for the purposes of an appeal to the Privy Council.

Mr. Holroyd in reply. Although the claim was not made in argument, the Court has on appeal in effect decided that it was made by the pleadings; and the Defendant is entitled to consider it as having been made and decided against him.

Judgment.
 —

MR. JUSTICE MOLESWORTH.—*Mrs. Wakefield* filed her bill, conceding that she had to give a right-of-way. The dispute was as to length, but the Defendant introduced into his answer another claim, from which he withdrew at the hearing, and did not argue it before the court below; so on appeal I cannot deal with him as intending to raise a claim thus repudiated. But whether that claim was raised or not, as the case now stands, there is nothing which would compel the owner of lot 17 to be content with a right-of-way for the full length of lot 16, as a substitute for the rights of way which have been closed;

and the re-opening of which would cause the injury said to exceed £500. All the Defendant can say is that if he got the full length, it would be a better inducement to the owner of 17 to accept the exchange. I am invited to come to the conclusion that the right-of-way is of the necessary value, though neither the servient nor the dominant tenement comes up to it. The Defendant says it is of special value to him, however trifling to another, as it is a means by which he can buy off an adverse claim. I think, however large the words of the Orders in Council may be, that I cannot give them this far strained effect, and accept this fantastic round-about definition of value. The value may be altogether fictitious, because to him it has an extraordinary value. If he had laid a wager of £1,000 as to the decree being in his favour, that ought not to be contemplated as an element of value, though involved in the appeal. In *Rolfe* and *Bailey's* case the Court acted on the view of reciprocity of rights in Plaintiff and Defendant. Apply that principle here, and reverse the position of the parties, could Mrs. *Wakefield* be heard if trying to avail herself of it, and working round this view of value in her favor. The application is untenable, and must be refused, with costs.

1869.
 WAKEFIELD
 v.
 PARKER.
 —
Judgment.

1869.

Nov. 25, 27.

WARE v. WARE.

On the impending marriage of a ward of Court, order made referring it to the Master to inquire whether it would be proper to allow any, and what, sum out of her estate for the purchase of a trousseau.

A SUIT was instituted for the administration of the real and personal estate of an intestate, to which his infant children were Defendants. The proposed marriage of one of the daughters, and articles of settlement, had been approved of by the Master. Her fortune was estimated at £12,000. One of the three guardians of the person, with whom the infant was residing, stated on affidavit that she had conferred with her co-guardians, and that they were all of opinion that, having regard to the infant's fortune, the sum of £250 would be a reasonable and proper sum to be paid to them for the purpose of purchasing the necessary trousseau for the infant on her marriage. The infant had a liberal allowance for maintenance.

Mr. J. W. Stephen, for the guardians, moved upon notice to the infant and to the intended husband, that the sum of £250 might be paid by the receiver in the suit or by the Master out of funds in Court, to the guardians of the infant's person, to be applied by them in the necessary purchases. He referred to *Pride v. Fooks* (r).

Our. adv. vult.

November 27. MR. JUSTICE MOLESWORTH:—

I have not found any direct authority for an application of this kind, but I think it may be granted. On consideration, I feel that the Court should follow the ordinary usages of the class of society to which its wards belong, and may allow them the same reasonable indulgence of

(r) 2 Beav., 430.

feminine vanity, on the occasion of their marriage, as parents would allow their daughters under similar circumstances :—

“Refer to Master to enquire and report whether it is proper to allow any, and what sum not exceeding £250 for trousseau; and Master to be at liberty to pay to guardians what he shall so approve to be by them applied.”

1869.

WARE

v.

WARE.

Judgment.

HONEY v. BUCKNALL.

THIS suit, by a single Plaintiff against a number of co-Defendants, now came on for taking evidence. Some of the Defendants appeared, others did not. There was no allegation in the bill, that any of the Defendants were out of the jurisdiction.

Mr. *Forster* and Mr. *Webb*, for some of the Defendants who had answered, objected that before the case could be proceeded with the Plaintiff must shew that all the Defendants who did not now appear had either been served with notice of the suit having been set down for taking evidence, or else had been served with the bill, and left the suit undefended. By the *Supreme Court Rules*, cap. vi., r. 14, the Plaintiff is, on the same day that he sets the suit down for taking evidence, to give the Defendants notice thereof. If that has not been done, the suit cannot be proceeded with —*Yandell v. Hector* (s)—unless the Plaintiff can excuse himself by shewing that as to the other Defendants the suit is undefended.

(s) *Ante* Vol. III., Eq., 173.

December 1.

Upon a cause being called on for taking evidence, some only of the Defendants appeared,

Held, that the Defendants who appeared could not then require proof of the bill, or notice of the setting down for taking evidence having been served on the Defendants who did not appear; but that the Plaintiff might go on at his own risk of being able to prove this when the cause came to a hearing.

When one of several Defendants is

out of the jurisdiction, this should be averred in the bill, and proved as part of the Plaintiff's case.

1869.
 HONEY
 v.
 BUCKNALL.
 —
Argument.

Mr. *Bunny* for *W. R. Kissane*, named a Defendant to the bill, but who had not been served, appeared to watch the case, and objected to the evidence being proceeded with until his client had been served, and had an opportunity of answering the bill.

Mr. *Martley*, for other Defendants who had answered, also objected to the evidence being allowed to proceed, the Defendants not having all been served with the bill.

Mr. *J. W. Stephen* and Mr. *Gregory* for the Plaintiff. The Plaintiff has a right to proceed to take evidence against the Defendants who have answered, without being delayed because he is unable to serve others of the Defendants. The objection that the other Defendants have not been served, cannot be taken until the hearing; and the Plaintiff may go on at the risk of whether he can then either prove the service or account for the non-service. Several of the Defendants who have not been served are in fact out of the jurisdiction.

Mr. *Forster* in reply.

Judgment.
 —

MR. JUSTICE MOLESWORTH.—I think the Plaintiff has taken a wrong course in this case. He has described various persons as Defendants, and attempted to go on without service upon them. Where a Defendant is out of the jurisdiction, the proper way is to aver it in the bill. It is a fact which ought to be in issue, and be either admitted by the other Defendants, or proved by the Plaintiff. Otherwise, I think the case comes improperly to a hearing. I think, however, this is not the proper time to take the objection. But I certainly would warn the Plaintiff that he must provide some way of meeting the difficulty before the hearing.

The evidence was then proceeded with.

MERRY v. HAWTHORN.

1869.

October 12,
December 16.

THIS was another suit arising out of the rights of the various parties interested in the Geelong and Ballarat Railway contract, and now came before the Court upon motion by the Plaintiff for an injunction. Upon the case being called on—

Mr. *Bunny*, for the Plaintiff, informed the Court that demurrers to the bill had been delivered by different Defendants since the notice of motion for the injunction had been served, and asked to have the demurrers argued *instantly*; it having been held by the full Court in *Attorney-General v. Scholes* (t), that an injunction ought not to be granted pending a demurrer.

Mr. *J. W. Stephen* for one of the Defendants, and Mr. *Webb* for others of the Defendants, *contra*. The rule, as we submit, is that if a Defendant takes the objection that a demurrer is an answer to an injunction motion, then the demurrer must be argued immediately; but it is not the privilege of the Plaintiff to have the demurrer argued until set down in regular course. It is the duty of the Plaintiff under the rules, unless he submit to the demurrer, to set it down for argument, and deliver a demurrer book. That has not been done in this case, and until the demurrers are set down, the Defendants do not know whether the Plaintiff intends to submit to them or not, and are not justified in instructing counsel to argue them.

Pending a notice of motion for an injunction a demurrer was delivered,

Held, that the Plaintiff was not entitled to insist upon the demurrer being argued *instantly*; but only to the option of postponing the motion for an injunction, until after the argument of the demurrer.

The full Court has no jurisdiction to entertain an appeal from the primary Judge unless the £50 deposit be lodged by the Appellant, even though he be suing *in forma pauperis*.

Mr. *Bunny*, in reply, cited *Cousins v. Smith* (v), *Anon v. The Bridgewater Canal Company* (w).

(t) 30th Sept., 1868; *Ante*,
Vol. V., Eq.

(v) 13 Ves., 164.
(w) 9 Sim., 378.

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 MERRY
 v.
 HAWTHORN,
 —
Judgment.

MR. JUSTICE MOLESWORTH.—There is, I should say, no assignable reason why because an injunction motion is brought forward by the Plaintiff, the Defendant should be hurried in the argument of his demurrer. I will give the Plaintiff the option of either hearing this motion, or postponing it until after the argument of the demurrer; but I will not accelerate the demurrer against the wish of the opposite party. If the practical result of the ruling of the full Court is that in every case of a demurrer an injunction motion is locked up, that result must follow.

The injunction motion was then proceeded with and dismissed. The demurrers were subsequently argued and allowed.

December 16. From the order allowing the demurrers, the Plaintiff who sued *in formâ pauperis* appealed to the full Court. The notice and grounds of appeal had been lodged and served within the time limited by the Act 19 *Vic.* No. 18, sec. 5, but no money had been paid into Court, as required by that section.

Mr. *J. W. Stephen* and Mr. *Webb* for the Respondents, objected that the appeal could not be heard, the requirements of the Act not having been complied with: *Hodgkinson v. Courtney* (x), *Olarks v. Wyburn* (y).

Mr. *Bunny* for the Appellant. The deposit is only required as a security for costs, and as the Appellant is suing *in formâ pauperis* there can be no costs given against him: *Bland v. Lamb* (z).

THE CHIEF JUSTICE.—This Court sitting in its Appellate jurisdiction is the mere creature of the Statute. It is

(x) *Vic. L. Times*, 146.
 (y) 12 *Jur.*, 167.

(z) 2 *J. & W.*, 402.

wholly a matter of jurisdiction, and we do not think we have jurisdiction to hear the appeal, except upon compliance with the conditions imposed by the Act.

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MERRY
v.
HAWTHORN.

Appeal struck out.

HUNTER v. RUTLEDGE.

Nov. 24, 26, 27.
December
16, 17, 18, 23.

BILL by *Evan Allan Hunter* and *Alexander McLean Hunter* on behalf of themselves and all others contributing money invested in the joint adventure in the bill mentioned except those who had assigned their shares to the Plaintiff *E. A. Hunter*, against *William Rutledge* and *Hawthorn* and others his mortgagees. The material allegations were as follow:—That *Alexander Hunter* (since deceased) in December, 1838, entered into an agreement, in Scotland, with *James Watson*, whereby *Watson*, then about to sail for Melbourne, agreed to invest money subscribed by *Alexander Hunter*

W. and H., being in fact agents for undisclosed principals, agreed with *E.* and others to join equally in the purchase of a special survey at Gipps Land, and paid to *E.* £1,024, being one-fifth of the purchase money. This was wholly

the money of their principals, but *E.* had no notice that *W.* and *H.* were agents only. *E.*, with the money subscribed by *W.* and *H.* and others, selected land at Gipps Land, and signed a memorandum in writing, dated 13th May, 1841, that he would, when the Crown grant issued, stand seised of that land in trust for *W.* and *H.* and the other contributors. Subsequently, in 1842, *E.*, with the consent of the Crown, substituted for the land at Gipps Land, land near Geelong. *W.* and *H.* protested against this, and asked for the return of their money. *E.* did not comply with this request, but subsequently, with the consent of the Crown, selected land at Port Fairy in substitution for that at Geelong, and in 1847 obtained the Crown grant for the land at Port Fairy, and dealt with it as his own. In 1869, the representatives of some of the undisclosed principals of *W.* and *H.*, on behalf of themselves and other undisclosed principals, sued *E.* in equity to establish a trust against one-fifth of the land at Port Fairy.

Held by the full Court, reversing *Molesworth, J.*, that the memorandum of 13th May, 1841, was a sufficient declaration of trust within the "*Statute of Frauds*" as to the land at Port Fairy; that *E.* held one-fifth of that land on an express trust within the "*Statute of Limitations*," for *W.* and *H.* or their principals. That the Plaintiffs, suing on behalf, sufficiently affirmed the investment on behalf of all the undisclosed principals, and demurrer over-ruled.

Held also, that neither *W.* and *H.*, or their legal representatives, were necessary parties, and that the bill praying a sale, and not a partition, it was not necessary that the Plaintiffs should by it offer to redeem mortgagees of *E.*, made Defendants to the suit.

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 —
 Statement.

and his friends resident in Scotland, and to be remitted to *Watson*, in the purchase of horses, cattle, and sheep; to manage the stock and send regular accounts to Scotland, and to be remunerated by a third of the proceeds. That *Watson* arrived in Australia, and pursuant to leave given him in that behalf by the agreement, entered into partnership with *John Hunter* in the business of the agency. That *Alexander Hunter* and about thirty other specified persons remitted to *Watson* and *Hunter*, as such agents, certain specified sums of money. That *Watson* and *Hunter*, as such agents, out of the moneys so remitted to them, purchased large quantities of sheep, cattle, and horses, and also certain lands in the district of Port Phillip. The sixth paragraph of the bill was as follows:—

“That for the purpose of investing the sum of £1,024 part of the money so remitted to them as aforesaid under the terms of the said agreement of the fifth day of December, 1838, the said *Watson* and *Hunter* entered into an agreement with the Defendant *Rutledge* and the other parties named therein, dated on the 13th day of May, 1841, between the Defendant *Rutledge* of the first part, *Lamb* and *Parbury* of the second part, *William Carr* of the third part, *Allan McGaa* of the fourth part, and the said *Watson* and *Hunter* of the fifth part, reciting that the said several parties thereto had joined together and contributed a sum of money, viz., the sum of £5,120 as therein mentioned, viz., the Defendant *Rutledge* the sum of £1,024, the said *Lamb* and *Parbury* the like sum of £1,024, the said *Carr* the like sum, the said *McGaa* the like sum, and the said *Watson* and *Hunter* the remaining like sum; and which said sum of £5,120 having been placed in the hands of the Defendant *Rutledge*, he had with the privity, consent, and approbation of the other parties, thereto laid out the same in the purchase of a section of land taken by special survey at Gipps Land, otherwise Corner Inlet, within the colony of New South Wales, and containing 5,120 acres, and being the second special survey obtained by the Defendant *Rutledge*, and numbered 19, he the Defendant *Rutledge*, for himself, his executors and administrators, did promise, declare, and agree with and to the said several other parties thereto and each of them, their, and each of their executors and administrators in manner following—That he the Defendant *Rutledge* should and would stand seized, and be possessed of all the said section of land of 5,120 acres so purchased and taken by him by and out of the joint moneys and property of him and the several parties thereto and every part thereof with their appurtenances, in trust for himself and the said *Lamb*, *Parbury*, *Carr*, *McGaa*, and the said *Watson*, in such parts, shares,

and proportions in all respects as the said sum of £5,120 the purchase money of the said land was provided and contributed; and that he the Defendant *Rutledge*, should and would convey and dispose of the same respective parts, shares, and proportions as the several persons respectively entitled thereto should require—Messrs. *Lamb* and *Parbury*, one; *Carr*, two; *McGaa*, three; *Rutledge*, four; *Watson* and *Hunter*, five; special survey, Corner Inlet, 5)5,120 acres=£1,024; and such memorandum of agreement was duly signed and executed by the Defendant, *William Rutledge*, and the said *Watson* and *Hunter*."

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Statement.

The bill then alleged that *Watson* and *Hunter* paid the sum of £1,024 as their contribution to the joint adventure; and *Rutledge* signed a memorandum on the original agreement to the effect that an agreement was to be prepared to secure to *Watson* and *Hunter* one-fifth of the special survey, they having paid their proportion of the money. The bill then stated certain transmissions of the other three fifth shares, which ultimately became vested in *Rutledge* alone; and averred that the sum of £1,024 subscribed to the joint adventure by *Watson* and *Hunter* was, in fact, part of the moneys which had been remitted to them by the several parties in Scotland, and that such parties were interested therein in proportion to the respective sums remitted by them. The bill then proceeded as follows:—

"That the said sum of £1,024 subscribed to the said joint adventure by the said *Watson* and *Hunter* as such agents as aforesaid, was either paid by them directly to the Defendant *Rutledge*, or was deposited by the said *Watson* and *Hunter* with the Colonial Treasurer for the time being in the name of the Defendant *Rutledge*, with his consent and by his direction as part of the purchase money for the said Gipps Land special survey then being or about to be applied for by the Defendant *Rutledge* under the provisions of the said agreement of the 13th day of May, 1841. That at the time when the said joint adventure was agreed upon, it was arranged that the application for the said special survey, and the Crown grant for the same should be made and taken in the name of the Defendant *Rutledge*, as trustee for and on behalf of the others interested therein; and that he should take the entire management and control thereof, and do all that was necessary for obtaining the said Crown grant, and accordingly the said sum of £5,120 so subscribed as aforesaid, was deposited in the sole name of the Defendant *Rutledge*, with the Colonial Treasurer for the time being of the said Colony of New South Wales. That before the said Crown grant for

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 —
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the said special survey in Gipps Land was issued, and sometime in the month of August, 1842, the Defendant *Rutledge*, without the knowledge or consent of the said *Watson* and *Hunter*, and with the sanction of the Governor of the said colony for the time being, proceeded or took steps to make a selection of land at or near Geelong in the said district, in lieu and instead of the said special survey in Gipps Land aforesaid; and the said *Watson* and *Hunter* having been afterwards informed thereof by the Defendant *Rutledge*, they wrote and sent to the Defendant *Rutledge* the following letter—'Melbourne, 21st September, 1842. Dear Sir—We were extremely astonished on the receipt of your letter of the 9th inst., to find that you had by a former post tendered for some land near Geelong without consulting or even acquainting us of it, which, considering the interest we held in the special survey, appears to us a most extraordinary proceeding. On enquiry at the survey office to-day we found that the land selected is on the River Leigh, about twenty-five miles from Geelong, a distance which would render the land perfectly unsaleable at the present moment for even ten shillings per acre, while for a part of the land selected by other parties near Melbourne £3 per acre has been refused, and supposing that it must have been fixed on to suit the private convenience of some one member of the special survey, and done without our knowledge or consent, we must beg you will have the goodness to refund us with as little delay as possible the sum of £1,024 which we paid into the special survey, No. , in May, 1841. We remain, Dear Sir, yours most respectfully, WATSON & HUNTER.' That the Defendant *Rutledge* did not, in compliance with such last mentioned letter, return to the said *Watson* and *Hunter* the said sum of £1,024; but in lieu and instead of the said special survey in Gipps Land aforesaid, and with the approbation of the Government of the said colony, made another selection of land at Port Fairy, in the district of Port Phillip in the said colony, and the said *Watson* and *Hunter* made no objection to such selection being satisfied with the propriety and advisability thereof. That such selection of the said land at Port Fairy aforesaid was approved of and allowed by the Government of the said colony sometime in the year 1843, and the consideration paid to the said Government for the same was the said sum of £5,120 so deposited as aforesaid in respect of the said Gipps Land special survey; and by a deed poll, or grant from the Crown under the seal of the said colony of New South Wales dated 23rd day of January, 1847, the said land and hereditaments at Port Fairy so selected as aforesaid therein described, and containing by admeasurement 5,120 acres were in consideration of the sum of £5,120 granted to the Defendant *Rutledge*, his heirs and assigns for ever, yielding the nominal rent and subject to the reservations therein mentioned. That the sum of £1,024, part of the sum of £5,120, the consideration expressed in the said deed poll to be the purchase money of the said land described therein, was in fact and in truth the money subscribed by the said *Watson* and *Hunter* under the terms of the hereinbefore recited agreement of the 13th day of May, 1841, in the said joint adventure; and

the said selection of land at Port Fairy aforesaid mentioned and described in the said deed poll, was taken or selected by the Defendant *Rutledge* in lieu and instead of the said Gipps Land special survey. That by the means and under the circumstances aforesaid, the Defendant *Rutledge* became a trustee of one-fifth part or share of the said land selected at Port Fairy as aforesaid, and comprised in the said Crown grant for the several parties, remitting the said moneys hereinbefore mentioned to the said *Watson* and *Hunter*."

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—
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The bill then set out a deed of 9th August, 1842, whereby *Watson* and *Hunter* being indebted to *Henry Ward Mason*, assigned all their real and personal estate as security upon trust to pay his debt and certain other debts. That in October, 1842, a suit was instituted in the Supreme Court of New South Wales by the Marquis of Ailsa and others (being the Scotch contributors) against *Mason*, *Watson*, and *Hunter*, seeking to have the deed of August, 1842, declared fraudulent as against the Plaintiffs, and an account against *Watson* and *Hunter*. That in February, 1843, *Watson* and *Hunter* sequestrated their estates as insolvent, and in their schedule stated as part of the land held by them—"£1,000 in the Gipps Land special survey held by *Watson* and *Hunter* for the benefit of the Marquis of Ailsa and others, whose names appear in a bill in Chancery in the Supreme Court, entitled *The Marquis of Ailsa and Others v. Watson and Others*. That *Mason* sequestrated his estate as insolvent in September, 1843. That the trustees in insolvency of *Watson*, *Hunter*, and *Mason*, were made parties to the suit by supplemental bill. That by decree in the suit made 21st September, 1844, it was declared that the deed of August, 1842, was fraudulent and void as against the Plaintiffs; and an enquiry was directed as to the proportion of sheep, cattle, horses, and other property thereby assigned belonging to the Plaintiffs and other persons not parties to the suit whose names were mentioned in the answer of *Watson*, and whether the shares of any of those others had been at any time and when assigned to the Plaintiffs, the Plaintiffs at the hearing undertaking by their Counsel to give the

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utmost effect to the rights of any of such persons. That on appeal to the Supreme Court of New South Wales in December, 1845, this decree was reversed and the bill dismissed. That on appeal to the Privy Council in July, 1849, the order of the Court of New South Wales dismissing the bill was reversed, and it was declared that the decree of September, 1844, should be varied by declaring that under the special circumstances of the case *Watson and Hunter* had authority to dispose of the property entrusted to them by the Plaintiffs in discharge of debts contracted and liabilities incurred by them on behalf of the Plaintiffs in the management of such property; and that the deed of August, 1842, was valid against the Plaintiffs to the extent of subjecting such property to such debts and liabilities contracted and incurred previously to the date of the deed; and that an account should be taken of such debts and liabilities, and provision made for payment of the same out of such property as aforesaid, and that save as aforesaid the deed was fraudulent and void, and that with this reservation the decree of September, 1844, should be affirmed. That the cause came on to be heard on further directions before the Supreme Court of New South Wales in December, 1850, when it was ordered, amongst other things, that *Mason* should restore to the receiver in the cause, moneys certified to be due by him on taking the accounts directed by the Privy Council. That *Mason* secretly withdrew from the jurisdiction to avoid further proceedings in the suit. That an attachment issued against him, and an order was made directing him to pay to the receiver a sum of about £20,000.

The bill then alleged that under the circumstances aforesaid *Mason* had no interest in any of the property of the Plaintiffs, purported to be assigned by the deed of August, 1842, and that he was out of the jurisdiction. That the Defendant *Rutledge* was informed of and well knew of the said suit of the *Marquis of Ailsa and Others v. Hunter and*

Others, and that the said sum of £1,024 so subscribed by the said *Watson* and *Hunter* was the proper moneys of the Plaintiffs in the said suit, and that he was a trustee of one-fifth part of the said Port Fairy special survey for the Plaintiffs therein, and that the assignees in insolvency of the said *Watson* and *Hunter* and *Mason* never claimed, or pretended to claim, and had not, in fact, any beneficial or assignable interest in the said sum of money or the investments thereof. That *Watson* and *Hunter*, soon after the date of their insolvency, left the jurisdiction in insolvent circumstances; that *Hunter* died in 1846 insolvent, and no person had ever become his legal personal representative; and that *Watson* had been long dead, and no person had ever become his personal representative. The bill alleged certain dealings by *Rutledge* with the land (the subject of the suit), namely, in August, 1848, a sale of 200 acres, a conveyance of a site for a church, and certain mortgages. As to the mortgages, of which the mortgagees were made parties as Defendants, the allegations of the bill were as follow:—

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“That the Defendant *Rutledge* has made divers mortgages of the said lands comprised in the said Crown grant at different times and to different persons, but there are now only two such mortgages affecting the said lands, namely, one to the Defendant *McLaren*, to secure the sum of £7,500 and interest, and another originally made to a firm carrying on business as *Flowers, Salting & Co.*, to secure the sum of £58,841 and interest (which has been since largely reduced), and such mortgage has since become and is now vested in the surviving members of the said firm, namely, the Defendants *Flowers, Hawthorn, and McDonald*. That the money now secured by the said mortgage to Messrs. *Flowers, Salting & Co.* was lent and advanced by the said firm to the Defendant *Rutledge* at different times, but in the said security such different sums are included in one large sum, but the Plaintiffs state, as the fact is, that long before the last of such sums was advanced to the Defendant *Rutledge*, the said Messrs. *Flowers, Salting & Co.* had received distinct and formal notice of the claims and interests of the said contributors in the said Port Fairy special survey.”

The bill then averred that *Rutledge* entered into possession of the special survey upon the issue of the grant, and

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had since continued in possession (except as to the part sold), and had let part of the land and occupied other part, not accounting to any one for his receipts. That *Rutledge* and his mortgagees had applied to bring the land under the provisions of the "*Transfer of Land Statute*." That repeated applications had been made to *Rutledge*, for a settlement or compromise of the claims of the Plaintiffs, and the other parties interested in the one-fifth part or share, by *Alexander Hunter* in his lifetime, and by the Plaintiff since his death, but without success; and that the offers made by *Rutledge* for a compromise had been so inadequate that all attempts for that purpose had failed.

As to the title of the named Plaintiffs, the bill set out a number of transmissions of personal estates by intestacies and wills, and English and Scotch probates and administrations, and also assignments by deed of the interests of several of the contributors mentioned in paragraph three. That several of these interests became thus vested in *Alexander Hunter*, one of the original contributors, who died intestate, and that the Plaintiff, *Alexander McLean Hunter*, administered in Victoria to his personal estate. That a deed was prepared between nineteen parties, the first eighteen being contributors, or assignees of contributors by the means aforesaid, and *Evan Allan Hunter*, party thereto, of the nineteenth part, whereby the eighteen parties purported to assign their interest in all the property acquired for them by *Watson* and *Hunter*, including the land the subject of the suit, to *Evan Allan Hunter*, and that the deed had been executed by all the parties except six persons, who had agreed to execute, and that the Plaintiff, *Alexander McLean Hunter*, had obtained letters of administration in Victoria to the personal estate of *Alexander Hunter*.

The prayer of the bill was as follows:—

"That it may be declared that the Defendant *Rutledge* was and is a trustee of one-fifth part or share of the said Port Fairy special survey, granted by the Crown by the said grant of the 23rd day of January, 1847, for the several persons hereinbefore stated to have remitted money for investment in the said colony to the said *Watson* and *Hunter*; and that such persons as between themselves were interested therein in the proportion which the money remitted by them respectively bore to the total amount of such remittances; and that the Plaintiff *Evan Allan Hunter* is entitled to the shares of such of them as executed the hereinbefore stated assignments of their respective shares to him, and the Plaintiff *Alexander McLean Hunter* to the shares of the said *Alexander Hunter*; and that an enquiry may be directed for the purpose of ascertaining what (if any) other persons were or was interested therein, the Plaintiffs hereby undertaking to give full effect to the rights of any persons who may be found, on such enquiry, interested in the subject of this suit, as the representatives or otherwise of such parties; and that an account may be taken of all rents and profits received by the Defendant *Rutledge*, in respect of the said lands comprised in the said Crown grant, including an occupation rent to be fixed, in respect of such parts thereof, as may from time to time have been in the occupation of the Defendant *Rutledge*; and that the said Defendant may be ordered to pay to the Plaintiffs the shares thereof to which they are respectively entitled as aforesaid; and that the residue thereof may be paid into Court, to be paid and distributed to the other parties, who, under the enquiry aforesaid, may be found entitled thereto in the proportion aforesaid; and that the said lands comprised in the said Crown grant, except the part already sold and conveyed, and that one-fifth part or share of the proceeds of such sale, after providing for the expenses of such sale, may be paid to the Plaintiffs and the other persons as hereinafter prayed in respect of the said rents and profits and in like proportions; and that it may be declared that the said mortgages of the Defendants *McLaren* and *Flower, Hawthorn* and *McDonald*, and also the value of the said 200 acres sold as aforesaid (such value to be fixed by the Master in Equity of this Honorable Court) ought to be borne and paid exclusively out of the four-fifth shares of the produce of the sale of the said lands belonging to, and the property of the Defendant *Rutledge*; or that such part or parts of the sum now due on the security of the Defendants, *Flower, Hawthorn*, and *McDonald*, as was or were advanced by them to the Defendant *Rutledge* after notice of the claims made in this suit by the said contributors may be postponed to the said claims of the Plaintiffs and the other parties interested in the said one-fifth part or share; and that for the purposes aforesaid, all proper accounts and enquiries may be taken and made, and directions given; and that in the mean time the Defendant *Rutledge*, and his said encumbrancers may be restrained from bringing the said lands under the operation of the 'Transfer of Land Statute,' and that the Defendant *Rutledge* may pay the costs of this suit and for further relief."

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The Defendant *Hawthorn* was the only one of the mortgagees resident in the jurisdiction and served with the bill.

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Rutledge and *Hawthorn* both demurred.

The grounds of demurrer by *Rutledge* were as follows:—
 (1) Want of equity. (2) That the Plaintiffs had no title to sue. (3) That it did not appear that *A. M. Hunter* had any interest in the suit. (4) Multifariousness. (5) Inconsistency and uncertainty. (6) That the trustees in insolvency, or the personal representatives of *Hunter* and *Watson*, were necessary parties. (7) That the trustee in insolvency of *Mason* was a necessary party. (8) That *Mason* was a necessary party. (9) "*The Statute of Limitations*."

The grounds of demurrer by *Hawthorn* included the above grounds and also the following:—That *Hawthorn* was a mortgagee, and the Plaintiffs did not offer to redeem him. That it did not appear that *Hawthorn*, at the time of his becoming mortgagee, had notice of the Plaintiffs' claim; nor whether the Plaintiffs admitted or impeached his mortgage. That it appearing by the bill who were the persons contributing to the joint adventure in the bill mentioned, and that they, or their personal representatives, were well known to the Plaintiffs, it was not competent for the Plaintiffs to institute this suit as on behalf of such contributors, or any of them; and all such contributors, or the personal representatives of such of them as were dead, should be parties to the suit.

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Mr. *J. W. Stephen* and Mr. *Webb* for both demurrers. There is no privity between the original contributors in Scotland and the Defendant *Rutledge*, so as to enable them to sue him. *Rutledge* dealt only with *Watson* and *Hunter*, and had no notice of any other person except them being

interested in the joint adventure of the purchase of the land. The money was originally advanced to buy cattle and stock, and the investment in land was altogether beyond the scope of *Watson and Hunter's* authority. Even if the original contributors could sue, the Plaintiffs do not represent them. A chain of representation is attempted to be shewn in the bill by various devolutions of interest by Scotch wills and administrations, none of which are binding in this colony; and at the same time the Plaintiffs appear to admit the necessity of having duly constituted personal representatives, for the bill alleges that the Plaintiff *A. M. Hunter* has taken out letters of administration in Victoria to the estate of *Alexander Hunter*, and that constitutes his only ground for being a Plaintiff. If it be necessary that *Alexander Hunter's* personal representative should be before the Court, it is equally necessary that the devolution of the shares of the other deceased contributors should be traced through personal representatives in this colony, and not through Scotch and English executors and administrators, as in the bill. Then the bill sets out an agreement to purchase land in Gipps Land, but shews no assent by *Watson and Hunter* to the substitution of the land in Port Fairy. They or those claiming through them are only entitled to the repayment of the money invested, and cannot follow the money into the Port Fairy survey; and this, being a mere money demand, is barred by the "*Statute of Limitations*." The Plaintiffs cannot institute this suit as on behalf of all the contributors, for there are none of the necessary allegations to support such a suit, *e.g.*, that they are very numerous, or that there is any difficulty in instituting a suit by them. On the contrary, they are all stated in the bill, and an attempt made, which however fails, to shew a derivative title in the Plaintiffs to the shares of all of them; and this is inconsistent with the idea of suing on behalf of them. There is no allegation of notice of the Plaintiffs' claim on the part of the mortgagees at the time they originally advanced their money, although there

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is such an allegation as to the time when further advances were made; and there is no offer to redeem them as to their original advances, admittedly made without notice. The bill therefore cannot be sustained as against them.

Mr. *Forster* and Mr. *T. a'Beckett* for the bill. *Watson* and *Hunter* were the agents of the Scotch contributors, not trustees for them, and even if they were not expressly authorised to invest in land, if the contributors' money was in fact invested in land, they have a right as undisclosed principals now to come forward and follow their money into the land which was ultimately purchased with it. There was an express declaration of trust by *Rutledge* as to the land in Gipps Land, which may be applied to the land at Port Fairy substituted for it. This express declaration of trust takes the case out of the "*Statute of Limitations*:" *Ernest v. Croysdill* (a), *Harris v. Harris*—No. 2 (b), *Salter v. Cavanagh* (c). The Plaintiffs, as representing all the contributors, have a right to ear-mark their money in *Rutledge's* hands, and so long as the land has not been sold to a purchaser for value without notice: *Taylor v. Plumer* (d). The bill does not seek to affect the mortgagees, except as to the money advanced by them subsequently to notice of the Plaintiffs' claim, it is not, therefore, necessary to offer to redeem them, their rights being otherwise admittedly paramount. It is not necessary, in a suit on behalf to allege specifically that the parties are very numerous, it is sufficient if that fact necessarily appears from the other allegations of the bill: *Weld v. Bonham* (e). The other cases cited were: *Witter v. Witter* (f), *Hassall v. Smithers* (g), *Taylor v. Salmon* (h), *Walworth v. Holt* (j), *Mathias v. Mathias* (k), *Ex parte Dumas* (l).

(a) 6 Jur. N. S., 740.
 (b) 29 Beav., 110.
 (c) 1 D. & Walsh, 668
 (d) 3 M. & S., 562.
 (e) 2 S. & S., 91.
 (f) 3 P. Wms., 99.

(g) 12 Ves., 119.
 (h) 4 Myl. & Cr., 134.
 (j) *Ib.*, 619.
 (k) 3 Sm. & G., 552.
 (l) 1 Atk., 232.

Mr. J. W. Stephen was not called on in reply.

MR. JUSTICE MOLESWORTH:—

This suit is instituted by persons claiming through *Watson* and *Hunter*, and the first question to be considered is, supposing *Watson* and *Hunter* had themselves sought to enforce a similar claim, what would their position be? About 1842, *Watson* and *Hunter* having funds in their hands which they treated as their property as between them and *Rutledge*, who is not stated to have known anything of their agency, entered with him and other persons into a particular speculation, viz.—the purchase of a special survey in Gipps Land, placing the money in *Rutledge's* hands for that purpose, and with a special agreement that if that purchase were effected, *Rutledge* should hold the land for the several contributors in proportion to their respective contributions. After the money was lodged for that purpose *Rutledge* seems to have changed his intention as to its application, and though the money was subscribed for one definite object, he applied it for another parallel object, seeking to obtain the grant of a special survey in another place. He wrote to inform *Watson* and *Hunter* of what he had done, and they wrote an answer rather angrily complaining of his having, without consulting them, invested money intended for one purpose in another, and they disclaimed the purchase which he then intended to make, and required him to refund the money which they had paid in for the special survey at Gipps Land. The parties were thus placed at arms' length as to what their rights were. It seems that notwithstanding this protest, and without further communication with *Watson* and *Hunter*, *Rutledge* changed his mind again, and in 1843 invested the money in the purchase of land in the neighbourhood of Port Fairy, which appears to have been perfected by a grant to him in 1847. What position did *Watson* and *Hunter* occupy after their letter was written? They

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had a right to get their money back which had been expended on a different object from that which they had intended. There is an averment that *Watson* and *Hunter* were satisfied with the investment at Port Fairy. That, perhaps, is an indirect averment that they in their own minds, without any communication with him, were content that the money should be invested in that different manner, but there is no averment of any communication whatever having taken place between *Rutledge* and them on the subject. Their right was clearly to get their money back. They did not do that. Perhaps if the money were laid out in a different manner to what they intended, and they could ear-mark it as so applied, they may have had an option either to affirm or disaffirm the transaction, and either treat him as a trustee or a debtor.

Most cases which have arisen on subjects of this kind have involved some question of insolvency, or the persons beneficially entitled have been infants; and I very much doubt whether, if *Rutledge* is to be taken as being then a perfectly solvent man, the doctrine of constructive application would apply. Here *Watson* and *Hunter* were adults fully capable of looking after their affairs. We have *Rutledge* doing what he decidedly had no right to do—applying money which he got for one purpose to another purpose, and that notwithstanding a protest—and *Watson* and *Hunter* would have the right either to enforce payment of their debt, or, perhaps, to exercise the option of taking the land instead of the debt. But the land being substituted for the debt was a matter of debateable expediency. It was a doubtful speculation, and under such circumstances persons who have the option of either affirming or disaffirming must exercise it with some degree of promptitude. They have no right to hang over the exercise of their discretion.

But I must couple this question now with the "*Statute of Limitations*." As to the money itself, there was an

express trust, as declared by the document which *Rutledge* gave, impressed upon the money regarded as invested in Gipps Land; but there was no declaration of trust as to the land either at Geelong or at Port Fairy. The utmost that could be made of it would be a constructive trust, and a constructive trust is one which by analogy to the "*Statute of Limitations*" must be enforced within, I am not sure whether twenty or fifteen years, but I believe that the fifteen years' statute is retrospective.

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Another aspect of the case is, how the "*Statute of Limitations*" operated upon the persons who sent out the money to *Watson* and *Hunter*. They sent it out to be applied in a different manner from that in which it was applied. It was applied to the purchase of land, a mere land speculation, although it ought to have been used for the purchase of stock, and I have then to deal with this case—suppose *Watson* and *Hunter* had actually got the one-fifth of this property, and not *Rutledge*, and had remained in possession of the property to the present time, how would it be as between them and the present applicants? Would it not be as between them a constructive trust, as to which the "*Statute of Limitations*" would operate? I therefore think that in this respect the Plaintiffs have no equity, and that if a right ever existed it would have been barred by the "*Statute of Limitations*."

This is the broader view of the case and the more material. Upon the other points it is hardly important I should express an opinion, but as I have heard the subject discussed I will state what my impressions are. I do not think that the bill is, properly speaking, multifarious; nor would I say that the objection of prolixity would lie.

Another ground of demurrer is, that the allegations of the bill are inconsistent and uncertain. I think the bill is

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open to that objection, for it endeavours in two different ways to give an excuse for not making parties to the suit those who are in the same interest with the Plaintiffs. It attempts in one way to meet that difficulty by framing the bill on behalf of the Plaintiffs and all other persons similarly interested, and then it goes on to explain and account for the derivative interests of a great many of those persons.

Then as to the objection that the trustees in insolvency, or the personal representatives of *Watson* and *Hunter* are necessary parties. I rather think that *Watson* and *Hunter* are disposed of. They unquestionably executed a conveyance of all their property to *Mason*, which would have passed this if it was not trust property, and the only reason urged why it did not pass it is, its being trust property belonging to the class the Plaintiffs claim to represent. The only aspect of the case in which *Watson* and *Hunter* should be represented, and that is rather far fetched, would be that they would be entitled to the residue, if any, after payment of *Mason*, and their assignees might have a possible interest in any overplus of assets. The trustee in insolvency of *Mason* is, I think, a necessary party. If this property passed to *Mason* by the trust deed, he or his assignees would be materially interested in controverting the assertion that the funds contributed by *Watson* and *Hunter* were held by them in trust for those through whom the Plaintiffs claim; also they might insist that as those the Plaintiffs represent had claimed the money against *Mason* they could not now claim the investment. I do not think *Mason* himself is a necessary party, he having become insolvent.

With respect to the objection that the Plaintiffs' claim was barred by the "*Statute of Limitations*," I think, as I have already said, that the fifteen years' statute does apply; and even with respect to the six years' "*Statute of Limi-*

tations," I have some doubt whether, if a demand may be treated either as a debt or a trust, and parties lie by till after the debt is barred by the statute, they can afterwards rely upon it as a trust. I think the fifteen years' "*Statute of Limitations*" does apply, the trust, if any, being a constructive trust.

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With respect to the ground that the Plaintiffs have not offered to redeem the Defendant *Hawthorn*, as mortgagee, the case made by the bill is, that as to a great part of the mortgage money he is a mortgagee having priority, and as to a portion only he is *puisne* to the Plaintiffs. The principle laid down as to an offer to redeem, which is more a matter of form than anything else, is that a mortgagee can insist that he shall not be made a party for any other purpose than to be redeemed, and as a mere matter of form I think the Defendants may raise the objection, there should be an offer to redeem so far as he has priority. I think there is probably a sufficient averment of notice in the mortgagee.

As to the objection that the several persons contributing to the venture should be made parties to the suit, I do not think it appears that the contributors were so numerous that their being made parties should be dispensed with, nor can the Plaintiffs well escape that difficulty by offering to give effect to such rights as they may succeed in establishing, more particularly in a bill of this kind, which is substantially the exercise of a right of election, which each of them has as much right to exercise for himself as the Plaintiffs have for themselves. For these reasons I shall allow the demurrer, with costs.

One order was drawn up allowing both demurrers, and Dec. 16, 17, 18.
from this order the Plaintiffs appealed.

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Mr. Forster and Mr. a'Beckett for the Appellants. The agreement of 13th May, 1841, set out in the bill, was a declaration of trust by Rutledge as to the money to be invested in the Gipps Land survey, and the allegations of the bill clearly show that this money was afterwards invested in the Port Fairy survey, and that the Plaintiffs' agent assented to the substituted investment. The bill does not charge Rutledge with any breach of trust in altering the destination of the fund in his hands; but to support the demurrer it is necessary, contrary to the bill, to infer fraud and misappropriation by Rutledge. In the absence of distinct evidence to the contrary, it will be assumed that Rutledge, a person having had money applicable to a particular purpose and applying it to a purpose substantially, though not exactly in the manner required by the trust, invested it for the purposes of the trust: *Mathias v. Mathias* (m). Where the trust fund, as in this case, can be traced into a particular purchase, the unauthorised purchase may be adopted as an investment by the *cestui que trust*, independently of, or contrary to the actual intention of the trustee: *Taylor v. Plumer* (n), *Story's Equity Jurisprudence* § 1210. The Port Fairy survey having been purchased by Rutledge, as trustee, with trust money, immediately upon the purchase being completed the express trust created by the agreement of the 13th May, 1841, applied to the new purchase. The trust is, therefore, an express trust within the exception of the "*Statute of Limitations*" (§ 39 of the Consolidating Statute, No. 213). It is not necessary to obtaining the benefit of the exception that the trust should have been declared as to the particular property the subject of the suit. It is sufficient if the trust which the suit seeks to enforce has been expressly declared, although it originally affected a different subject matter: *Salter v. Cavanagh* (o), *Harris v. Harris*—No. 2—(p), *Ernest v. Croysdill* (q), *Rolfe v. Gregory* (r).

(m) 3 Sm. & G., 552.

(n) 3 M. & S., 562.

(o) 1 Dr. & Walsh, 668.

(p) 29 Beav., 110.

(q) 6 Jur. N. S., 740.

(r) 11 Ib., 97.

The purchase made by *Watson* and *Hunter*, if not within the scope of their agency, could be adopted as a proper investment by the ratification by their principals, who have in fact affirmed it. *Rutledge* cannot take advantage of an excess in the agents' authority to repudiate a contract into which he had entered with them. The principal may in equity, as well as at law, at any time disclose himself, and insist upon the completion of a contract entered into on his behalf; and need not make the agent a party to a suit to enforce it. The Plaintiffs cannot be affected prejudicially by lapse of time since the purchase, as nothing remained to be done by them in the interval. They had contributed all they were required to pay, and until the trust was repudiated they had a right to assume that the obligations of the trust were recognised, and would be fulfilled when an account was called for. The letter of September, 1842, which is relied upon as a withdrawal from the original agreement converting *Rutledge* from a trustee into a debtor had reference to the particular transaction objected to. The Geelong purchase having been abandoned, and the money not having been returned, the letter had no further operation. It sufficiently appears by the bill that *Watson* and *Hunter* have no beneficial interest. They were mere trustees, and their absence being accounted for the *cestui que trusts* may sue without them. The proceedings in the suit of the *Marquis of Ailsa* and others against *Mason* are relied upon as shewing that *Mason* has no interest, the decree and orders in that suit amounting to an adjustment of accounts as between *Mason* and the Plaintiffs, bringing him in a debtor to them. The decree of the Privy Council in that suit is an authority for the frame of the present suit, and the inquiry sought as to the parties interested who are not and cannot be individually parties. The interest in real estate which *Watson* and *Hunter* acquired for the Plaintiffs must be taken to be personalty for the purpose of transmission: *Darby v. Darby* (s). As to the mortgages, their position is recognised so far as they are

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(s) 3 Drew., 844.

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mortgagees without notice, and in that respect a sale of the equity of redemption only can be sought. As to the moneys advanced after notice, the Plaintiffs say there is no valid mortgage; and it is only as to such advances that the mortgagees are brought before the Court. In that capacity the Plaintiffs are not bound to offer to redeem them.

Mr. J. W. Stephen and Mr. Webb for the Respondents. Secs. 7 and 8 of the "*Statute of Frauds*" and secs. 97 and 98 of the Act No. 234, require all declarations of trust as to land to be in writing, unless arising by implication or construction of law. The only declaration of trust in this case is as to land at Gipps Land. If that trust is applied to land at Port Fairy, the trust as to that land arises by implication of law, and is purely constructive. Admitting that the trust may be so applied as a constructive and not an express trust, it is barred by the "*Statute of Limitations*," which excepts nothing but an express trust. To escape the difficulty created by the one statute, the Plaintiffs must bring themselves within the operation of the other. A constructive trust will be barred by the "*Statute of Limitations*:" *Charitable Donations v. Wybrants* (t). The trust declared was not a trust of money to be invested in land, but a trust to attach to one special purchase if made, which was not made. It was not a trust of money, but of land. The one object for which alone Rutledge undertook to become trustee having been abandoned, and the letter of September, 1842, having been written claiming the return of the money contributed to that special object, Rutledge became a debtor as to the money, and could not have bound Watson and Hunter by any investment which he made of it. At the time the Gipps Land purchase was made they did not treat it as made on their behalf; and they cannot be permitted after withdrawing, by their letter, to lie by waiting to see

(t) 2 Jo. & L., 182.

whether or not the investment turned out profitably, leaving *Rutledge* to bear any loss, and accountable to them for any profit. The Plaintiffs were bound by the acts of their agents who elected to withdraw from the only venture in which *Rutledge* was willing to join them. It appears, from the agreement set out in the bill under which *Watson* and *Hunter* were employed, that they had no authority to invest in land. We admit that all the principals might have agreed to adopt the investment in land, but there has been no such agreement. There is no allegation of any election to accept the investment by the principals of *Watson* and *Hunter*. Some, not all, of the principals are represented in this suit; and they shew no right to elect on behalf of all. Those not before the Court may refuse to adopt the purchase, and may assert a claim to the money, which would be enforceable against *Rutledge*, unless barred by the "*Statute of Limitations*." If the purchase is to be treated as adopted as a purchase of land, the interests of the purchasers would descend as realty, there being nothing in the bill shewing any intention to sell; and the real representatives, instead of the personal representatives, of deceased contributors should be before the Court. If the Plaintiffs adopt the investment, their proper remedy is a partition, not a sale, which is contrary to the terms of the agreement under which they claim. In this aspect, also, the absence of parties contributing is material, some seeking to elect on behalf of all, between partition and sale. The bill does not distinctly recognise the priority of the mortgagees as to advances before notice, but asks generally for a sale as against them. The bill drawing no distinction between their position before and after notice and seeking to deal with them on a common footing as to all advances, should have contained an offer to redeem.

Mr. *Forster* in reply. A trustee cannot by his own act, in the unauthorised withdrawal of the subject of an express trust and the substitution of another, change his position

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to the prejudice of his *cestui que trusts* from that of an express to a constructive trustee. The substitution of the Port Fairy survey for the Gipps Land survey was *Rutledge's* act, and the same trust attached to the one as would have attached to the other had he conformed to the original intention, which he unnecessarily departed from. A partition has been rendered impossible by *Rutledge's* dealings with portions of the property, and sale is the only available remedy.

Cur. adv. vult.

December 23. THE CHIEF JUSTICE :—

*Judgment on
 Appeal.*

It appears from the statements in the bill that two persons—*Watson* and *Hunter*—were entrusted, some years ago, with large sums of money to be invested in stock in this colony. This money belonged to persons resident in Great Britain, whose interests the Plaintiffs owned or represented. *Watson* and *Hunter* made various investments, and arranged with *Rutledge*, one of the Defendants, to join with him and others in the purchase of some land. According to the Orders in Council, then the law of the country, the mode of obtaining land at that time was to pay a certain sum of money into the Treasury, obtain a receipt, and on that receipt the applicant was entitled to take up land where he pleased.

Five persons joined in this arrangement to purchase, the Defendant *Rutledge* being the man of business, and acting for the others in the matter. He was to make the selection, and the Crown grant was to be issued to him. The Plaintiffs—for in this part of the case the Plaintiffs on the record and *Watson* and *Hunter* may be treated as the same—the latter being the agents of the former, or of those whom they represent—contributed £1,000 and upwards towards the purchase. The money was lodged in the Treasury. Land

at Corner Inlet was selected by the Defendant *Rutledge*, who signed a declaration that when the grant was issued he would stand seised of the property in trust for the other persons. No grant was ever issued for that land. The declaration of trust was therefore a declaration of a future trust, to be impressed on land when the Crown grant issued. For reasons not disclosed, the Defendant *Rutledge* evidently considered the selection was not a judicious one, and by some means obtained the consent of the Government to abandon that selection, and make a fresh one in the vicinity of Geelong. After this second selection was made the Plaintiffs became aware of it, and wrote in somewhat indignant terms, remonstrating with the Defendant *Rutledge* for having made it without communicating with them. They did not complain of any impropriety in giving up the land at Corner Inlet. Nor would they have complained of the land at Geelong if they had been satisfied that the Defendant *Rutledge* had applied his own judgment to that selection; but they expressed an apprehension that this second selection was made, not in consequence of his thinking it the most suitable, but to meet the convenience of one only of the co-contributors. That letter concluded by a demand for £1,000—the amount actually contributed being meant. No answer was given, the money was not returned, the Plaintiffs took no further steps; the money was not acknowledged as a debt by the Defendant; it was still, therefore, the money of the Plaintiffs.

The selection near Geelong was afterwards abandoned, and the money was finally invested in a third selection at Port Fairy—apparently a much more suitable one than either of the other two. The Plaintiffs are satisfied with it, *Rutledge* is satisfied with it, and the Crown grant has been issued to him. Inasmuch as the Defendant *Rutledge* neither acknowledged the money advanced by the Plaintiffs as a debt, nor paid it back, he is in the position of a person who either must admit that he invested this

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 HUNTER
 v.
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 —
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 Appeal.*

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HUNTER
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Appeal.*

amount as trust money for the benefit of the Plaintiffs as well as himself, or that he borrowed and used money of other persons for his own purposes without authority. On a demurrer pleadings are to be taken most strongly against the pleader, but certainly the Court is not to regard the conduct of any Defendant more censoriously than it is put by the pleadings, and it is not so put by this bill. We think, therefore, it must be taken for granted that the Defendant *Rutledge* did not borrow the money of other persons without leave, but that he invested it advisedly and intentionally in the third selection as trust money, and for the Plaintiffs' benefit as well as his own. That being so, according to our view, the letter demanding the return of the money not having been acted on, is of no effect.

A suit was subsequently instituted by those whom the present Plaintiffs represent calling *Watson* and *Hunter* to account, they having in the mean time attempted to assign all their property to a person named *Mason*, who was made a co-Defendant to that suit. The assignment, although purporting to be one of the property of *Watson* and *Hunter*, was really an assignment and was so treated in the suit, only of the property which they were entrusted with by the Plaintiffs. The Resident Judge of this Court decided that the assignment was fraudulent, and void, and ought to be set aside. That decision was reversed on appeal to the Supreme Court of New South Wales; but the Privy Council reversed this last decision and the decree of the Resident Judge was affirmed, with this slight modification, that any rights of third persons arising from the intrusions with the property by these agents, who had been clothed by the owners at home with the power to deal with it as if it were their own, were to be conserved. The bill sets out all these facts; it asserts that the land finally selected was mortgaged without notice of the existence of these trusts; and that further advances were afterwards

made by the mortgagees with notice; and it prays for a sale. The Defendants *Rutledge* and *Hawthorn* demur, and the demurrer has been allowed.

1869.
HUNTER
v.
RUTLEDGE.

*Judgment on
Appeal.*

The first ground of demurrer is want of privity. It is said that *Watson* and *Hunter* are the only parties interested; that the authority by the persons in Great Britain was to invest in stock, and not in land, and therefore they had no interest in the land. That position cannot be sustained. The act of an agent, if in excess of his authority, may be adopted or rejected by the principal, at his option. The only person concerned is the principal, and third persons cannot interfere or raise the objection. The Defendant *Rutledge* must admit, according to the bill, that this £1,000 was the money of the Plaintiffs, and they now say that they choose to stand in the same position as their agents, and they are at perfect liberty so to do.

The next ground of demurrer is that Plaintiffs have been guilty of *laches*. But the Defendant, being a trustee, we are not aware of any limitations, apart from those imposed by statute, recognised in equity. If the Defendant is once shewn to be a trustee there is an end of the question of *laches*. The dispute really between the parties, and on which the argument mainly turned was as to the applicability of the "*Statute of Limitations*." It was urged that this was not an express but only a constructive trust. Now there is a great difference between the creation of a trust and the evidence of it. A trust may be created by certain acts done, and the evidence of it may rest on parol only. The Statute requires that it should be evidenced in a certain way; and when once it becomes an express trust it is subject to certain advantages. But the declaration of trust is not required to be in writing as in the case of a contract within the "*Statute of Frauds*." The object of a declaration of trust is simply to have a statement by the trustee admitting that his conscience is bound with regard to a certain

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v.
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—
*Judgment on
Appeal.*

matter; that though, nominally, he is the owner of the property, yet in *foro consciencie* he is not. If he make that declaration in form so as to evidence what his intention is, that is quite sufficient. In the present instance there was a declaration of trust referring to the selection in Corner Inlet only. It was made before the grant issued. The declaration was not that he did, but that he would stand seised. It is contended that, as he never got that land, the trust is rendered inoperative for want of a subject. That position, however, cannot, we think, be sustained in equity. When the Defendant substituted the land at Geelong for that at Corner Inlet, and subsequently that at Port Fairy for the latter, he cannot be heard to say that he by his unauthorised act rendered his own declaration of trust inoperative. When he substituted one piece of land for the other, he, in effect, also substituted that land in the declaration of trust for the land described in it. But this was put, not by the Plaintiffs or by the bill, but by the Defendants or their counsel as a tortious act of the Defendant *Rutledge*. If so, we think the case is relieved of all difficulty for the principle of equity is undisputed that no person can benefit by his own tortious act. It is unnecessary to consider what the rights of the parties would have been had the exchange of one piece of land for the other been made with the Plaintiffs' consent, for they say they were not aware of the change until after it was effected. We think it is fairly to be inferred that they were aware of it, but only after the selection was made, and then did not dissent therefrom. Therefore the rights of the parties are not the same as if the Defendant *Rutledge* had been induced to make the selection, not of his own wish, but at the express request of his co-contributors. We allude to this because the point has not escaped our attention, and it is desirable that the parties should know that we do not express any decided opinion upon it.

The next objection taken was want of parties, Plaintiffs. We think the decree of the Resident Judge affirmed by the

Privy Council is binding upon us as an authority, and sufficiently meets the objection, and there the undertaking by Counsel at the bar to meet the rights of any parties who might subsequently be proved interested, was held sufficient.

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v.
RUTLEDGE.
—
*Judgment on
Appeal.*

The next objection is the want of parties, Defendants, but their interests have gone. Individually, *Watson* and *Hunter* had no interest whatever. Their interest was as the agents of the parties in Great Britain. The assignment to *Mason* is set aside, and the only thing saved is the rights of third persons arising from their intromissions.

The last point is that there is no offer to redeem the mortgagees. As to that, the Plaintiffs do not ask for a partition, but for a sale; and under the peculiar circumstances of the case it appears to us that the Plaintiffs cannot have a partition, for the original charges on the land were made without notice of the existence of the trust, and cannot, therefore be disturbed. The advances made with notice form the subject of this litigation. The Plaintiffs merely wish a sale of the equity of redemption, subject to the charges which they cannot disturb, and therefore the offer to redeem would be the veriest formality.

We offer no opinion as to the ultimate result of the suit, but we have no hesitation in saying that the bill requires an answer.

The appeal will be allowed with costs, and the demurrer over-ruled with costs. We give a month, exclusive of vacation, to answer.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,

AT LAW.

IN

EASTER TERM, 32 VICTORIÆ.

The Judges who sat in Banc in this Term were—

STAWELL, C. J.
BABBY, J.

WILLIAMS, J.

IN THE MATTER OF THE CONVICTION OF
FRANCES JANE LEWIS.

1869.
March 23.

RULE *nisi* under “*The Justices of the Peace Statute 1865*,” No. 267, section 136, obtained by *Jane Frances Lewis*, who had been convicted before Justices at Ballan under “*The Wines, Beer, and Spirits Sale Statute 1864*,” No. 227, section 45, calling on the Justices, and on the Complainant, *James Sainsbury*, to shew cause why they should not be prohibited from further proceeding upon, or in respect of the conviction.

The affidavits set forth a summons to *Lewis*, for that she did at a date and place named, “sell and dispose of, or per-

At the return of a rule *nisi* under No. 267, sec. 136, to prohibit further proceedings on a conviction for breach of No. 227, sec. 45, it appeared that no conviction was yet drawn up, and that no “minute or memorandum” of the conviction was

shewn; but it was sworn to be believed, that further proceedings would be taken by warrant, on the mere entry in the magistrate’s book of the daily cause list.

Held, that on the return of such a rule, the “*Justices Act*” contemplates the exhibition to the Court of such materials as will enable it to amend the conviction, if erroneous; and that a copy of the entry in the cause list affords no such materials; and rule for prohibition discharged.

1869.

In re
LEWIS.

mit to be sold and disposed of, liquor, to wit, two glasses of ale, to one *James Sainsbury* "without a license, contrary &c., that the objection was taken that the summons disclosed two offences; that the magistrates convicted; that no conviction had yet been drawn up or signed by the justices; but that Defendant's attorney believed that "without such formal conviction, a warrant will issue against the said *Jane Frances Lewis*, merely upon the entry in the magistrates' book," which was in these words: "Fined £5. 5s., and £1. 10s. costs." The affidavits set forth no such "minute or memorandum" of the conviction or order, as is mentioned in "*The Justices Statute*" section 106.

C. A. Smyth for the rule.

No appearance *contra*.

STAWELL, C. J.—"*The Justices Statute*" clearly contemplates that such materials shall be before the Court, as will enable us to amend the conviction if it be erroneously drawn. We have no conviction here: indeed it is sworn that none is yet drawn up in proper form; and no such "minute or memorandum," as section 106 places at the disposal of the Defendant without payment of any fee, has been obtained and brought before us; under these circumstances there is nothing we can properly prohibit.

C. A. Smyth.—The real point below was that the summons was duplex.

STAWELL, C. J.—We will decide that point when it comes before us.

Rule discharged.

JOPLING, APPELLANT, v. LAWLOR, RESPONDENT.

1869.

March 24.

APPEAL CASE stated by Magistrates in Petty Sessions at Ballaarat.

Jopling complained that *Lawlor*, being a toll-collector at Ballaarat, demanded and took from *Jopling* a toll of one shilling for two horses and two drays engaged in carting manure, although exemption (a) from such toll was duly claimed. The magistrates dismissed the complaint, and stated a case as follows:—

“It was proved that the Defendant was a toll-collector receiving toll at the toll-gate established on the road leading from Ballaarat to Creswick. That the Complainant is the occupier of a bone-crushing mill situate about a quarter of a mile from the said toll-gate. That on the thirteenth day of November last Complainant was forced to pay to Defendant the sum of one shilling toll for two horses and two drays engaged in carting bone-dust in bags, and that the complainant duly claimed exemption from the payment of said toll, on the ground that his horses and carts were engaged in carting manure.

“It was admitted by complainant that one of said loads of manure was about being conveyed to the railway station at Ballaarat, and from thence to Melbourne for exportation to Ceylon, where it is used as a manure on the coffee plantations, and that the other load was consigned to Messrs. *Everingham, Greenfield & Co.*, commission agents, for sale as manure to the farmers in the district.

“We were of opinion that the bone-dust was manure, but inasmuch as it was ground chiefly for the purpose of export that it was not exempt from the payment of toll; we therefore determined that the matter hereinbefore stated was insufficient to support said complaint.”

Fellows for the Appellant.—This “manure” was not the less manure, that a part of it was ground for export. In *Pratt v. Brown* (b) it was held that the fact that part of the material was for sale made no difference. The whole was deemed exempt.

(a) Under No. 176, sec. 252.

(b) 8 C. & P., 244.

Two cart-loads of bone dust were claimed, as manure, to be exempt from toll, under No. 176, sec. 252. One load was intended for export to Ceylon, where bone-dust is used as manure; the other was intended for sale, as manure, to the farmers in the district. *Held*, that the bone-dust for export was not exempt, and that for local use was exempt.

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 JOPLING
 v.
 LAWLOR.

Higinbotham for the Respondent.—In *Pratt v. Brown* it was all intended for manure in the country of manufacture, or it was all going to the farmers' land immediately or mediately. Here half of it was only an article of commerce, so far as this country is concerned. The exemption is in favour of agriculture, not of commerce. *Dant v. Moore* (c).

Fellows in reply—Agriculture is as much benefitted by exempting it from tolls in the hands of the first maker, as the last distributor.

PER CURIAM.—The apparent policy and object of the Act was to give a benefit to the agriculturists occupying land in this country. We think that the cart bearing manure for use here was exempt; and that bearing manure for export, was not exempt. The toll-keeper was fully justified in asking the question he did, though in acting on the judgment he might form upon the answer to his question, he might do so at some peril. Both sides have been to some extent right; there will, therefore, be no costs.

Appeal allowed, no costs; decision to be reversed; case to be remitted with the opinion of the Court.

(c) 9 L. T., N.S., 381.

March 25.

WINGFIELD, APPELLANT, v. GLASS, RESPONDENT.

A memorandum delivered with impounded cattle to a poundkeeper, was headed, like a letter, by these words:—
 "Loddon,
 Nov. 2, '68."

APPEAL case stated by Justices in Petty Sessions at Inglewood, on the hearing of a complaint by *Hugh Glass* against *James Wingfield* for illegally impounding sheep.

The case stated that *James Wingfield* by his agent, impounded sheep of *Hugh Glass*; that the "Defendant's farm

Held, that such a memorandum did not, within "*The Pounds Statute 1865*," sec. 11, sufficiently "specify the place where the said cattle were trespassing."

was situate on the river Loddon;" and that "the sheep were driven to, and impounded in, the Inglewood pound, being the nearest pound;" that the impounding agent delivered to the pound-keeper, with the sheep, a written memorandum as follows:—

1869.
WINGFIELD
v.
GLASS.

" Loddon, November 2nd, 1868.

" To the Poundkeeper, Inglewood.

" Please receive into pound four hundred and forty-five (445) "sheep, mixed kinds, for trespass in my crops. Trespass, one shilling. " Owners wholly unknown.

" J. WINGFIELD,
" Per W. H. N. WINGFIELD."

The Justices determined that this memorandum did not sufficiently, within the meaning of "*The Pounds Statute 1865*" No. 249, section 11, "specify to the keeper of the pound the place where the said cattle were trespassing;" and this appeal was from such determination.

Mackay for the Complainant below, in support of the determination.—The description of the place must be such as to enable the trespasser to find the place, and know both whether the pound resorted to is the "nearest" pound, and whether the impounder is entitled to double or treble damages on a second or third impounding "off the same land." The word "Loddon" is perfectly vague; it is the name of a river 400 miles long, and of an enormous district including a multitude of farms; and such a description would never enable the owner to "find the place." *Degraves v. Bennett* (d), *Smith v. Lindo* (e), *Dwarris on Statutes*, p. 661.

Martley for the Appellant, cited *Butcher v. Smith* (f).

STAWELL, C. J.—That case is wholly inapplicable to the present. The word "Loddon" does not express whether the

(d) 2 W. & W., L., 191.

(e) 27 L. J., C. P., 196.

(f) Sup. Ct., Vic., 7 Dec., 1868.

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 v.
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land was enclosed and cropped, so as to enable the pound-keeper to charge the appropriate fees; nor does it describe the place of the trespass in such a way as the trespasser has a right to have it described under the Act.

Appeal dismissed.

March 23.
 April 1.

REGINA v. PANTON, P.M.

Under the "Lunacy Statute," No. 309, magistrates cannot issue a distress warrant against a shire council to enforce payment of the expenses of examining and removing a lunatic, without first giving the council affected, an opportunity of being heard against payment.

Proceedings on an order for distress, for nonpayment of an order to pay, made *ex parte*, prohibited.

RULE *nisi* to prohibit magistrates from enforcing an order directing a distress warrant to be issued against a Shire Council, for non-payment of an order certifying the amount to be paid for the examination and removal of a lunatic found within the shire. There were three rules—against the Shire Councils of Bannockburn, Bellerine, and Barrabool. All were argued together.

Fellows for all the Councils.

Dunne, Molesworth, and Singleton in support of each respective order.

The question was whether, under the "*Lunacy Statute*," No. 309, the magistrates could call upon the councils to shew cause why a warrant of distress should not be issued before giving them an opportunity of opposing the grant of the certificate. For the councils it was contended that when lunatics are arrested, the councils ought to be heard before a certificate was granted to the medical men for their fees. At present the councils are not heard at all, and know nothing of the matter till they receive the order requesting payment, and behind that order the justices afterwards decline to go when asked for a distress warrant. On the other hand, it was urged that the "*Lunacy Statute*" makes

no provision whatever for the councils being heard on these occasions. A form of proceeding is prescribed from which the councils appear to be studiously omitted

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REGINA
v.
PANTON.

Our. adv. vult.

STAWELL, C. J.—The question in these cases is as to the proper mode of enforcing an order for the payment of expenses of conveying a lunatic to a lunatic asylum. The local Act on the subject adopts several clauses of the English statute. Justices are enabled to cause any person to be examined by a medical practitioner, to determine the proper sum to be awarded for the expenses of the lunatic's removal, and for the fees of the medical practitioners. The local Act, however, diverges from the English law in the mode of recovering the expenses awarded. According to the latter, those expenses may be recovered by indictment for a misdemeanour; the former prescribes that obedience to the justices' order may be enforced by the medical practitioner, or other person in whose favour the same has been made, in like manner as any order by justices for the payment of money. The prohibition is asked for, on the ground that although the justices possess the power to assess reasonable compensation and expenses, yet their order must be enforced in the usual way, namely, that the parties against whom it is made must first be heard. We concur in that view; for, although the parties may be called on to shew cause against a distress warrant being issued, that does not enable them to go behind the order. They ought to be afforded a fair opportunity of disputing that the lunatic was not found within the district, or raising other objections, which may be properly made against the order.

April 1.

*Rules for prohibition, in the three cases,
made absolute.*

1869.

March 25.

April 1.

Where upon return to *habeas corpus* it appeared that the prisoner was detained in a Victorian gaol on a warrant issued in New South Wales, and backed in Victoria, and that he had been charged in New South Wales with murder on the high seas, but eluded capture in New South Wales and escaped thence to Victoria.

Held, that he could not be sent back to New South Wales for trial, but must be tried in Victoria; and prisoner discharged from detainer on such warrant.

IN THE MATTER OF HUGO LEVINGER.

MOTION to discharge *Hugo Levinger*, on the reading of the return to a writ of *habeas corpus*.

The return set forth that the gaoler detained the prisoner under a warrant issued in New South Wales, and duly endorsed in Victoria, by which warrant it appeared that the prisoner was charged in New South Wales with committing murder on the high seas.

Fellows, for the prisoner, contended that the return was insufficient. The "*Constitution Act*" of New South Wales, under which the warrant was issued (*g*), gives the Supreme Court of New South Wales civil and criminal jurisdiction. A distinction is drawn between offences triable in the colony, and those committed in the colony. Section 3 gives jurisdiction for internal offences; section 4 for external offences—giving power to hear and determine upon all murders, &c., committed upon the sea, or in any haven or place where the admiral has power and jurisdiction, or committed in any island not subject to a European power, by any of a crew of any British ship. Thus, by the latter clause, offences not committed in New South Wales were triable there. Then the 18 & 19 *Vic.*, cap. xci., sec. 21, also gives authority to try this offence. The clause is in these terms:—"If any person, being a British subject, "charged with having committed any crime or offence "on board any British ship on the high seas, or in any "foreign port or harbour is found within "the jurisdiction of any court of justice in Her Majesty's "dominions which would have had cognisance of such "crime or offence if committed within the limits of its "ordinary jurisdiction, such court shall have jurisdiction "to hear and try the case as if such crime or offence had

(*g*) 9 *Geo. IV.*, cap. lxxxiii., secs. 2 and 3.

"been committed within such limits." The prisoner being found here, the offence is clearly triable here, and there is no reason why he should not be tried here. By the 6 & 7 Vic., cap. xxxiv., sec. 2, persons charged with committing any offence in any part of Her Majesty's dominions, and escaping to any other part of her dominions, may be apprehended on warrant issued from the colony where the offence was committed and endorsed in the colony where he is found, and section 3 gives authority to commit the offender to gaol until he can be sent to the place where the offence is committed. The object of that Act is merely to send the offender to the place where he can be tried, and applies only to an offence committed in a British territory. The argument for the Crown is that the prisoner may be "charged" in New South Wales with an offence committed elsewhere. [*Stawell*, C. J.—If the question of policy is to be considered, it is to be remembered that there may be a difficulty in procuring witnesses. *Barry*, J.—Is it contended that if an offence is committed in one possession, and the offender escapes to another possession, he must be sent back to the place where the offence was committed?] Yes. [*Barry*, J.—Suppose an offence is committed outside the British possessions, and the offender is charged in New South Wales, and the witnesses are all taken there, and the offender escapes to another possession, you say he must be tried where he is found, and not sent back to New South Wales?] Yes. A man is only to be sent back to the other possession when he has committed an offence there, not when he is merely "charged" there with having committed an offence elsewhere. Section 7, making provision for the offender in case of acquittal to be sent back to the possession from which he was brought, bears out the same view.

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Reference was then made to *Ex parte Bessett (h)*, *Re Windsor (j)*, and to the clauses in the French and American

(h) 6 Q. B., 481. (j) 6 B. & S., 522.

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In re
 LEVINGER.

extradition treaties, as showing the difference between committing an offence in a country, and being charged in a country with having committed an offence.

Adamson for the Crown.—Where any doubt is entertained as to the interpretation of an Act, the question of inconvenience should be considered. In this case, unless the prisoner is sent to New South Wales, there will probably be a failure of justice, as the Victorian courts can not compel the attendance of the New South Wales witnesses. I rely upon the words of the 6 & 7 *Vic.*, cap. xxxiv., as interpreted by the 12 & 13 *Vic.*, cap. xcvi. The jurisdiction is not confined to offences committed within the particular colony; the words throughout the different sections relate to the places where he was “charged” with having committed the offence. If the prisoner could be tried in any of the colonies, the jurisdictions of the different courts might clash, and he may be again tried in one when he has been acquitted in another, for a charge may be made in the absence of the prisoner. This prisoner was triable in New South Wales, and the warrant on which he was arrested is only preliminary to his trial taking place there.

Fellows in reply.

Cur. adv. vult.

April 1.

STAWELL, C. J.—It appears that *Hugo Levinger* was detained in custody, having been charged in New South Wales with the crime of murder, committed on the high seas: that a warrant was issued for his apprehension, but he escaped, and was apprehended here. The return shews a warrant treating him as if he had been apprehended under the statute 6 & 7, *Vic.*, cap xxxiv. The sufficiency of this warrant depends on the proper construction to be placed upon the statute. For the prosecution it was urged that the 1st section of the 12 & 13 *Vic.*, cap. xcvi., enables all things auxiliary to a

trial to be done by the country in which the person escaping is found, and that it enables the authorities here to transmit the prisoner to another colony; and thus, that if any doubt exists as to the power conferred by the 6 & 7 *Vic.*, it is remedied by this statute. I think, however, that the things auxiliary, only refer to the trial, and not to the apprehension of a prisoner. It was for purposes of trial that additional powers were conferred upon the Court of the colony in which the prisoner is found; and it would be straining those words to hold that they mean also auxiliary to the apprehension. For the prisoner, it was urged that it was quite unnecessary now to consider if this Court had power to transmit the accused to New South Wales, as he might be tried here; the 12 & 13 *Vic.*, cap. xcvi., enables the Court to try a prisoner if found here, and being found within this colony, the jurisdiction of this Court attached, no matter where the offence was committed. The subsequent power conferred on the Court cannot, however, assist the Court in any way in putting a proper construction on the previously passed statute, the 6 & 7 *Vic.* It must be considered as if the subsequent Act had never passed, and if the prisoner be discharged, so far as this Court is now concerned, he may go where he pleases. A subsequent Act may be so incorporated with a previous one, as materially to assist in construing it. But the 12 & 13 *Vic.* has no direct reference to the 6 & 7 *Vic.*; the circumstances of each are completely independent. The objection appears to be one of the purest technical nature, but although that is so, no violence must be done to the rules of interpretation. The first section of the 6 & 7 *Vic.*, cap. xxxiv., declares that if any person is charged with having committed an offence in any of Her Majesty's dominions, and if he escapes to the United Kingdom, and if a warrant shall have been issued against him within that part of Her Majesty's dominions where such offence shall have been committed, such warrant may be endorsed. Stopping here, it is beyond doubt that the offence must be committed

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within Her Majesty's dominions. The subsequent portions of the Act, taken independently, might perhaps leave it doubtful what the Legislature intended. The second section provides that persons charged with committing offences within any part of Her Majesty's dominions, and escaping to other colonies, may be arrested on warrant. The third section, under which the present proceedings are taken, states that the offender charged with having committed "such offence," may be committed to prison. What is meant by "such offence?" Obviously the offence mentioned in the second section. The words of the third section, taken by themselves, may not be very clear; but a reference to the first and second sections puts their meaning beyond doubt. The words of the third section are that the prisoner shall "there remain until he can be sent back to that part of Her Majesty's dominions in which he is charged with having committed such offence." These words may possibly refer either to the place where the offence is charged, or to the place where the offence is committed; but the first and second sections shew that they refer to the place of the offence. I think this is not a case falling within the Act, and that the prisoner is entitled to his discharge.

BARRY, J.—The 9 *Geo. IV.*, cap. lxxxiii., regulating the administration of justice in New South Wales and Van Diemen's Land, was in force several years before an attempt was made to apply generally to the British possessions, the law peculiar to New South Wales. In 1843 an Act was passed for "the better apprehension of certain offenders." According to it, persons previously beyond the pale of the law by escape to other colonies than that in which the offence was committed, were brought within the reach of justice. If he commit an offence in England and be apprehended in a British colony, an offender may be sent to England to be there tried; or, *vice versa*, for an offence committed in any of the colonies, he may be apprehended in England, or in any other colony. The provisions of this Act were not found

sufficient to meet all contingencies, and larger powers were given by the "*Merchant Shipping Act*," by which, for any crime committed in any part of the world, although not in the dominions of Her Majesty, the offender may be tried by any competent court in that part of Her Majesty's dominions where he is found. In this case the offence was not committed in Her Majesty's dominions, but it is proposed to send the prisoner to that province where he first arrived after committing the offence. So far as an examination of the statutes enables me to discover, provision has not been made for the extradition, or transmission from one colony to another, of an offender for an offence committed not in Her Majesty's dominions, and I think the prisoner ought to be discharged.

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In re
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WILLIAMS, J., concurred.

Prisoner discharged (k).

(k) He was immediately re-arrested on a Victorian warrant for trial in Victoria.

FINN v. RAY.

April 5.

THE Plaintiff obtained a verdict in an action to recover back £100, paid by him as a cash deposit on a purchase of the Defendant's business stock-in-trade, under a contract, the material parts of which were as follow:—

A contract for purchase of stock-in-trade at a valuation, provided for the appointment of valuers, who, be-

fore commencing their valuation, were to appoint an umpire. The valuers commenced their valuation without appointing an umpire.

Held, that the appointment of the umpire was a condition precedent to the valuation; that the original agreement fell through from non-compliance of the valuers with the condition precedent; and, that the purchaser was entitled to recover his deposit paid under the contract.

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v.
RAY.

46 Elizabeth Street, Melbourne,
20th November, 1868.

Messrs. Ray & Co., Clunes.

GENTLEMEN.—I have this day purchased from you, as from 30th November, 1868, the whole of your stock-in-trade and lease of premises occupied by you in Frazer Street, Clunes, on the following terms, viz.:

STOCK: Two-thirds to be taken over by me at cost mark, i.e., Melbourne cost price and expenses of carriage added; the remaining one-third to be taken at a valuation. Each party to appoint a valuator, who, before commencing their valuation, will mutually appoint an umpire whose decision as to valuation will be final and binding on all parties concerned as to such parcels only as the valutors cannot agree upon.

LEASE: &c.

(Signed) JOHN FINN.

I have this day sold to you my business, stock-in-trade, and lease of premises, in terms of your purchase note of this date.

(Signed) JAMES RAY & Co.

A rule *nisi* was obtained to set aside the verdict, and enter one for the Defendant on the grounds:—
(1) That the appointment of the umpire previously to entering on the valuation on the 3rd December, 1868, was not a condition precedent to the carrying out of such valuation.
(2) That subsequently to the alleged valuation on the 3rd December, the Plaintiff treated the contract as still subsisting, and thereby waived any right he might have otherwise had.
(3) That there was no valuation at all under the contract of the 20th November, 1868.

Fellows and *Wrixon* shewed cause.—This was a conditional contract, under which the appointment of an umpire was a condition precedent to the valuation. The condition had not been performed, and could not have been so before action brought. Therefore the whole arrangement under the written contract fell through. No new arrangement could be made by parol under the statute. *Noble v. Ward* (l), *Crawshaw v. Collins* (m), *Bright v. Durnell* (n), *Oheslyn v. Dalby* (o).

(l) 1 L. Rep., Ex., 117.
(m) 3 Swans., 90.

(n) 4 Dowl., P. C., 756.
(o) 2 Y. & C., 170.

Dobson for the rule.—There was evidence for the jury that the Plaintiff adopted the acts of the two valuers; and that the mode in which the latter proceeded was not a fair one, or one in accordance with the proved intentions of the parties, and from which the Court will see that it would be grossly inequitable for the Plaintiff to recover back this £100. *In re Hick* (p).

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STAWELL, C. J.—The valuers omitted to appoint an umpire at the proper time; they did not agree, and their valuation consequently fell to the ground. It was urged for the Defendant, that the Plaintiff had by his acts continued the agreement; that they afforded sufficient foundation for the valuers declaring that the Plaintiff had failed to complete or perform his part of the agreement, though it seems difficult to discover how those acts could, after the failure of the original agreement. If this had not been a contract under the statute, there might possibly have been evidence to go to the jury from which they would have been justified in coming to the conclusion that an alteration was made in the agreement, under which the valuers went on and made their valuations without appointing an umpire, with the sanction of the Plaintiff; although even in this aspect there is no consideration for the alteration. But the Defendant is met at the outset with the difficulty of the original contract being under the statute, and the impossibility of altering or extending it except by writing. We think that the old agreement had sped, and that there was no evidence which could have been sent to a jury from which they could properly infer a new one under the statute. The verdict must therefore stand.

Rule nisi discharged.

1868.

December 9.

1869.

April 9.

MCDOWALL AND ANOTHER, APPELLANTS, v. MYLES,
RESPONDENT.

Myles, a Crown lands' bailiff, summoned *McDowall* and another, Crown lessees, for forfeiture of their land by breach of the conditions of their lease under "*The Amending Land Act 1865*," sec. 15; and in proof of the forfeiture, he put in a *Government Gazette* containing a notification of the forfeiture, signed by the President of the Board of Land and Works. The Defendants contended that the *Gazette* was proof of forfeiture. The magistrates held otherwise, and determined to grant an order to dispossess. On appeal,

Held, that the *Gazette* is no evidence of forfeiture, but evidence only of the intention of the Governor-in-Council to enforce, by forfeiture, a breach of the law, or of the terms of holding, if such breach have actually occurred; that the magistrates should have enquired if such breach had in fact occurred; and determination reversed.

APPEAL case stated by magistrates in Petty Sessions at Camperdown, on determining to grant to *Myles*, a crown-lands' bailiff, an order to dispossess *McDowall* and another of land in an agricultural area, which they occupied under the "*Land Acts*" as selectors and lessees; and which *Myles* claimed for the Crown as forfeited under "*The Amending Land Act 1865*," No. 237, sec. 15, for non-fulfilment of the conditions of the lease.

At the hearing, in proof of the forfeiture, was produced a copy of the *Government Gazette*, containing a notification subscribed "*J. M. Grant*, President of the Board of Land and Works," and declaring the lease of *McDowall* and another to be forfeited under section 15 of the "*Land Act 1865*." It was contended for the Crown that the *Gazette* was *prima facie* evidence, and if uncontradicted, full proof of the forfeiture. For the Defendants it was contended:— (1) That no forfeiture had occurred under the "*Land Act 1865*." (2) That no declaration of forfeiture by the "Governor-in-Council," had been proved. (3) That there was no evidence that the provisions of section 15 of the Act, or the conditions of the lease, had been violated. The magistrates held that they could not go behind the *Gazette*, and that the *Gazette* was evidence that a forfeiture had accrued. They determined to grant a warrant to the Plaintiff; the Defendants appealed; and the magistrates stated this case.

Billing (with him *C. A. Smyth*), for the Respondent, in support of the complaint and decision below.—The “*Statute of Evidence 1864*” No. 197, sec. 26, enacts that where the Governor-in-Council is empowered to do any act, proof of the *Gazette* purporting to contain a copy or notification of such act, shall be *prima facie* evidence of such act; the “*Amending Land Act 1865*,” section 15, enables the Governor-in-Council to declare a forfeiture of this land for non-performance of the conditions of the lease, or breach of the provisions of the Act. The *Gazette* containing the declaration of forfeiture, is therefore *prima facie* evidence of the non-performance of the conditions of the lease, or breach of the provisions of the Act. Any general argument that the tenant should have an opportunity of disputing the facts forming the basis of forfeiture, is displaced by the positive enactment; and indeed it is not to be supposed that the Board of Land and Works would advise the Governor to declare the forfeiture, before a full and conclusive enquiry.

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Fellows for the Appellants.—Under the Act of 1865, section 15, the publication in the *Gazette* of the declaration of forfeiture, is not made evidence of the forfeiture, or of the facts forming the basis of the forfeiture, but of the date at which the forfeited term, if forfeited the term shall have been, is to cease. It notifies the intention of the Governor-in-Council to insist on the forfeiture, supposing the event constituting the forfeiture, to have actually taken place. The other construction is so contrary to natural justice, that it can only be adopted under express enactment. Section 1 of the “*Land Act 1865*,” enacts that it shall be read together with the “*Land Act 1862*,”—the two as one Act. Section 123 of the Act of 1862, is the only section in either Act which gives jurisdiction in this matter to the justices. It enacts that upon the Crown-lands bailiff preferring an information that the Defendant is in unauthorised or illegal possession of Crown lands, the

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justices shall, if they are satisfied of the truth of the complaint, issue a warrant to dispossess. Now, when any forfeiture takes place, the party to benefit by it, has an option whether he will take advantage of it or not. The effect of the proviso in section 15 of the Act of 1865, as to the notification of the forfeiture in the *Gazette*, taken together with section 26 of the "*Evidence Act*," must be that the production of such *Gazette* shall be evidence of the intention of the Governor-in-Council to take advantage of the forfeiture; and the justices must then satisfy themselves of the truth of the complaint, by hearing evidence on both sides as to whether the events upon which a forfeiture accrues, have or have not occurred. There is nothing in these Acts to say that the existence of these events shall not be proved, nor even (as in some Acts) that the *onus* shall lie upon the Defendant to prove their non-existence. The "*District and Shires Act*," No. 176, sec. 221—224, makes a peculiar tribunal of the Governor-in-Council, and gives that tribunal power finally to decide: in that case this Court will not interfere. The "*Corporations Act*," No. 184, sec. 19, is of a similar character to the present enactment. In that case, as in this, the facts may be enquired into before the ordinary tribunal of the country, and this Court may rectify those tribunals where erroneous in their proceedings. No other landlord would eject without proving a breach, even under the most stringent lease; and in this case the Crown bailiff must prove before the justices, as any other landlord must prove, firstly, a breach of the Act or the lease, and secondly, the intention of the landlord to punish the breach by forfeiture. Here the second requisite has no evidence in support of it.

Billing in reply.—Are justices in petty sessions to sit as a court of review over the Governor and his advisers in Executive Council? [*Williams, J.*—No mode seems to be furnished by the Act for proving the facts on which the Governor declares a forfeiture to have taken place, or for

allowing the tenant to defend himself.] The justices are to satisfy themselves—first, that A. B. is in occupation of the land in question; and then, that it is forfeited land, and that it is proved by the *Gazette*. The bailiff has nothing to do until after the forfeiture. Into what court, then, is the *Governor* to go, to inform himself whether a forfeiture is proved?

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Cur. adv. vult.

STAWELL, C.J., read the judgment of the Court as follows:—

April 9.

Case stated by the Court of Petty Sessions, Camperdown. Proceedings had been instituted against the Appellant for being in unauthorised occupation of Crown lands, forming part of an agricultural area. The Appellant and another person were lessees thereof. A notification in the *Government Gazette*, declaring that the lease had been forfeited under the 15th section of the "*Amending Land Act 1865*," was relied on as proof of the forfeiture; and the substantial question for our consideration is, whether such a notification afforded evidence of violation of the provisions of that section.

These provisions prohibit any person becoming, either in his own name or that of another, lessee, sub-lessee, or assignee, of more than 640 acres of land proclaimed; or any person who is an infant; or a married woman not having obtained a decree of judicial separation binding in Victoria, or who is not domiciled in Victoria: or who, in respect of any portion of the land for which he applies, is agent, servant, or trustee, for any other; or who has entered into an agreement to allow any other person to acquire the land, or the applicant's interest therein; and all applications for land are to be made *bonâ fide*, and not as agent, servant, or trustee, of any other person. Then follows a proviso that if any person shall, in violation of these provisions, become

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the lessee, &c., of an allotment, the Governor-in-Council may declare the lease of such allotment forfeited; and upon publication in the *Government Gazette* of notice of such declaration, the term created by the said lease shall cease and determine, &c., and the right, title, and interest of the lessee, &c., to such lease, and to all moneys paid for rent, &c., shall be forfeited, and the land may be sold in fee simple, or leased again as therein provided.

The deciding on the violation of almost any one of these provisions must, if that violation is disputed, necessarily involve the determination of matters of fact; those matters being supported, as may be expected in most cases, by conflicting evidence *pro* and *con*. Yet the Act creates no machinery—in the manner provided by the 11th and 12th sections of the 27 *Vic.*, No. 184, for example—enabling any person or body to institute the inquiry necessary in any such instance, and to hear and take evidence; nor is it declared, as in sections 13, 19, and 221, of 27 *Vic.*, No. 176, that the ruling of the Council or of any Minister on the point in dispute, shall be conclusive. A clause analogous to this proviso, if inserted in any contract between subject and subject—a lease, for example—would render that lease void in the event of a forfeiture, and determine the tenancy; but an ejectment to dispossess the overholding tenant would still be required, and in that action the Plaintiff would be called on to prove the act of forfeiture upon which he relied. An Act of Parliament ought, in our opinion, to be interpreted by the like rules of construction, and those rules are not to be altered or disobeyed in order to prevent the unseemliness, as it was said, of a court of petty sessions trying facts on which the Council are supposed to have decided. Nor does this construction, as was put during the argument, render the clause inoperative. The fact of the forfeiture having been committed, the date from which the lease is to become void, as well as the intention of the Government whether to enforce

or waive that forfeiture, may all be matters of public interest. Under this clause, the publication in the *Gazette* conveys information to the public as regards all these points—the fact, the time, and the intention of the Executive not merely to enforce the forfeiture, but indirectly also to dispose of the land again as may be deemed advisable.

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The Respondent, however, in addition to the construction of the "*Land Act*" for which he contended, also urged that the "*Statute of Evidence 1864*," section 26, made the notification in the *Gazette*, *prima facie* evidence that the act which the Governor-in-Council was authorised to perform had been duly done, and consequently that the forfeiture had been committed. We think, under the terms of that section, a notification in the *Gazette* affords *prima facie* evidence that all requisites of form have been complied with. Thus the notification, though bearing the signature of one Minister only, is, until contradicted, proof that the lease has been declared to be forfeited in the manner prescribed by the section of the "*Amending Land Act*." But the operation of the "*Evidence Statute*" does not, in our opinion, extend so far as to render the mere notification in the *Gazette* of an act having been done, any evidence whatever that all the facts and circumstances necessary to authorise the doing that act, really existed and had been proved. The statute makes the notification *prima facie* evidence as regards form, as we think; as regards substance including all preliminary essentials, as the Respondent contends. But he cannot, in our opinion, rest there; his arguments, if tenable, prove that it is not merely *prima facie*, but conclusive. Unless it were so, the unseemliness on which he rested those arguments would still arise, if the forfeiture were disputed, and evidence adduced by the lessee. We do not desire it to be inferred that it would in our opinion be incompetent for the Legislature to have declared the ruling of the Council, or of any other body, a final disposition of the question; or the publi-

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cation in the *Gazette* conclusive evidence of the forfeiture having been committed. We cannot but think, however, that if Parliament had deemed it necessary to constitute one of the parties a judge in his own cause, such an intention would have been expressed in terms so unequivocal, as to have admitted of no doubt or misapprehension. The decision is, we think, erroneous, and should be reversed. The case will be remitted to the justices, with our opinion thereon.

Appeal allowed accordingly.

PRATT v. WILLIAMS.

April 5, 9.

If a deed be executed by an attorney under power, before the filing of the power under No. 204, sec. 98, the deed is not (unless confirmed) of any validity, either before or after the filing of the power.

EJECTMENT for land conveyed to Plaintiff from *John Smith* by deed, executed for him by *George Johnston* under power of attorney. Verdict for Plaintiff.

Rule *nisi* to set aside the verdict for Plaintiff, and enter a nonsuit, on the ground that the power of attorney from *John Smith* to *George Johnston*, under or by virtue of which the conveyance of the 10th November, 1868, from *John Smith* to the Plaintiff was executed, was not filed in the office of the Registrar-General before or at the time of the execution of such conveyance.

Fellows shewed cause.—The question is whether the words in "*The Instruments and Securities Statute 1864*," No. 204, section 98, "unless the power of attorney shall have been filed as hereinbefore directed," mean that a conveyance executed by attorney under power, shall have no validity at all, if not executed after the filing of the power; or shall have its validity suspended until after such filing—whether, in fact, the second word "unless" in that section should be read "if not," or "until." The Legislature has

not spoken with absolute clearness, or in a peremptory manner, and the rights of parties ought not to be diminished by strictly interpreting the second word "unless" as "if not." A sufficient meaning is given to that word by reading it as "until." The section is in its framing not mandatory, but simply enabling. It gives to "any person" power to file the power; and then it goes on to say that if he does so, the advantages of section 95 shall be enjoyed. On the other hand, any deed executed under the power, shall not enjoy the advantages of validity "until" the power under which it is executed "shall have been filed." As in case of a deed wanting confirmation, "until" the power is filed, or "until" the confirmation is executed, the deed is inoperative, not void. Other sections, as 96, clearly contemplate a gap or interval, during which the deed, though not void, is not valid.

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Williams for the rule.—This Act is a consolidation of former Acts. Section 98 is a re-enactment of section 4 of the former "*Powers of Attorneys Act*" No. 28. In the former Act the words used were "And no conveyance which shall hereafter be executed, shall, unless confirmed as aforesaid, be of any force or validity whatsoever until the power of attorney shall have been filed as hereinbefore directed." In the present Act the words used are "And no conveyance, mortgage, or other specialty, which shall hereafter be executed by the attorney, shall (unless confirmed as aforesaid) be of any force or validity whatsoever, unless the power of attorney shall have been filed as hereinbefore directed." The Legislature has therefore in consolidating the law, dispensed with the word "until" and adopted the second word "unless," in its stead. If the Legislature has changed its expressions, it must be supposed to have changed its intentions. The Court cannot escape the duty of interpreting plain expressions according to their plain meaning.

Cur. adv. vult.

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STAWELL, C. J.—The question in this case depends on the proper construction to be placed on the 98th section of "*The Instruments and Securities Statute*," which repealed and re-enacted the 21st *Vic.*, No. 28. That latter Act prescribed certain things to be done by those who may have wished to take advantage of the large powers conferred by it, with reference to conveyances executed under powers of attorney. The power must be filed, and if filed it rendered valid the acts of the person conveying. The words of the 4th section ran thus:—"No conveyance which shall hereafter be executed by the attorney shall, unless confirmed as aforesaid, be of any force or validity whatever, until the power of attorney shall have been filed as hereinbefore directed." According to this section, the person exercising the power by means of which the conveyance has been executed, is allowed a *locus penitentie* until some dispute arises. "Unless" appears the appropriate word to use with reference to a deed of confirmation, "until" with reference to the registration. No conveyance, unless confirmed, shall be of any force, until the power has been registered. But this Act was repealed and re-enacted, with certain alterations, and in the repealing statute "until" has been altered to "unless." The section referred to, the 98th, now runs as follows:—"No conveyance, mortgage, or other specialty, which shall hereafter be executed by the attorney, shall (unless confirmed as aforesaid) be of any force or validity whatsoever, unless the power of attorney shall have been filed as hereinbefore directed." If we attach the ordinary meaning to the second word "unless," the section will have a harsh effect. It will practically amount to this—that two persons, although agreeing together to enter into a contract to be carried out by deed of conveyance executed under a power of attorney, cannot do so unless that power of attorney has been filed at the time the deed of conveyance is executed. The deed is not valid unless the power of attorney has been filed. It appears to me that the alteration

made by the Legislature of "until" to "unless," was done advisedly, and that it was never meant to attach the same meaning to "unless" as to "until." There may have been several reasons which rendered such a course advisable. The execution of deeds through the medium of a power of attorney embarrasses titles, especially in a country where the grantees are not, or may never have been, residents, and it may have been deemed advisable to discourage and render invalid such a mode of execution, unless the power of attorney was filed, and thus made public. If the alteration of the word was made advisedly, the Court cannot alter it; if it was done inadvertently, the Legislature is the proper medium of correcting the error. Our duty is to follow its directions according to the plain meaning and sound construction of the words, however harsh the result may be. The rule for a nonsuit must be absolute.

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BARRY, J.—I think we are bound by the words of the Act; they do not state, and I am at a loss to discover, the object of the Legislature in changing the law. By section 90, the power of attorney remains in force until the determination of it shall have been registered. A person owning land may leave this country, having entrusted a power of attorney to his agent to execute a conveyance; and if the owner dies in England or returns to the colony, if the power of attorney is filed and subsists, all the acts done until the death or return to the colony of the owner is registered, are valid. That may be done so soon as the intelligence of the death or of the return is received, or it may be postponed till any period that is thought fit. A *locus penitentiae* was left before the clause was altered, for the vendor or purchaser to register the power of attorney. If a deed is executed, and the person constituting the authority to make it die, and the registration of death does not take place for ten years, any act done under the power is valid; and the registration of the power might also have been effected at any time during those ten years. Now,

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however, the *locus penitentiae*, as regards the registration of the power, is completely taken away, so that this consequence takes place—that the power must be registered before any act is done, while the other and more important registration may be postponed *ad infinitum*. I am of opinion that the words of the Act have been intentionally altered; that they are clear and specific; and it would not become us to put any other interpretation upon it than we have done.

WILLIAMS, J.—We must not go out of our way, to put an extraordinary meaning upon ordinary words, apparently used in their ordinary sense.

Rule absolute.

April 5, 6, 9.

HUNTER v. SHERWIN, J.P.

Sherwin, J.P.,
 fined Hunter
 under the
 "Police
 Offences
 Statute" for
 trespass, and
 stated an
 appeal case.
 The Supreme
 Court re-
 mitted the

case, with its opinion that if a claim of title was made *bonâ fide*, the magistrate's jurisdiction was ousted. Sherwin reheard the matter, held that there was no claim of title made *bonâ fide*, convicted and "adjudged" that Hunter be fined 5s., and £7 7s. costs, and, in default of payment forthwith, imprisoned for five weeks. The conviction and warrant were bad, and Hunter, after lying six days in prison, was liberated on *habras corpus*. Sherwin, under pressure, stated another case for the Supreme Court, on the hearing of which his determination was reversed. Hunter brought an action against Sherwin for false imprisonment and malicious conviction, and got a verdict for £50. On rule *nisi* to set aside the verdict, on the ground that the conviction had not been "quashed," as required by the "Justices Act," sec. 164,

Held, that a conviction, bad for excess of jurisdiction, can be brought up by *certiorari*, though *certiorari* is taken away by the statute under which the magistrate purported to act; that reversal on an appeal case, is not equivalent to quashing on *certiorari*; and that this conviction ought to have been, could have been, and had not been, quashed; and rule absolute for nonsuit.

damages £50 and one farthing, and for the Defendant on the third count. The rule *nisi* was obtained on the ground that the conviction under which the magistrate had committed the Plaintiff, was never quashed as required by "*The Justices of the Peace Statute 1865*" No. 267, section 164. The facts material were as follow :

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Twenty years ago *Sargeantson* possessed land on the river Plenty, and *Hunter* was employed by him. Nineteen years ago *Sargeantson* left Victoria, or left the neighbourhood of the river Plenty, and *Hunter* entered into possession of his land, asserting that he had owed *Hunter* money, and had in payment given over to him the land. *Hunter* lately became insolvent. *Sargeantson* has died, leaving children outside Victoria. The guardian of the children, by an agent in Victoria, let the land on the river Plenty to *Willis*. The official assignee of *Hunter* sold his estate to *Daniels*, who authorised *Hunter* to occupy the land on the river Plenty. *Willis* summoned *Hunter* for wilful trespass on the land, contrary to "*The Police Offences Statute 1865*." The summons was heard by the Defendant *Sherwin*, a magistrate. *Hunter* claimed title to the land, and objected that the magistrate's jurisdiction was thereby ousted. The magistrate determined against the objection, but stated an appeal case for the Supreme Court. The Supreme Court remitted the case with its opinion that, if a claim of title was made *bona fide*, the magistrate had no jurisdiction. The summons was reheard. The magistrate decided that on the facts, the claim of title was not made *bona fide*, and convicted and fined *Hunter*—"adjudged" that *Hunter* be fined 5s. and pay £7 7s. costs, and that in default of payment forthwith he be committed to prison for five weeks. *Hunter* gave notice of appeal to the Supreme Court, but *Sherwin* committed him to prison. *Hunter*, after lying six days in prison, was brought before a judge of the Supreme Court on *habeas corpus*, and liberated. *Sherwin* ultimately, under pressure, stated another

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appeal case, and on that case the Supreme Court reversed his determination. The question now raised was, whether this reversal of the determination of the magistrate was such a quashing of the conviction made by him, as is required by section 164 of the "*Justices Statute*."

Ireland, Q.C., Mackay, and C. A. Smyth, shewed cause.—The "*Police Regulation Statute*" takes away *certiorari*, and gives no appeal to General Sessions; there is only the appeal case stated for the opinion and decision of the Supreme Court given by the "*Justices Statute*." It follows, that if this conviction cannot be quashed, or dealt with in a manner equivalent to quashing, on the appeal case to the Supreme Court, there can be no remedy at all for false imprisonment on this illegal conviction. It is firstly contended, independently of the statutes, that where a conviction is bad on the face of it, the Court will not grant *certiorari* to bring it up; in such a case there is nothing to quash. *Reg. v. The Justices of the West Riding (n)*, *Reg. v. Wood (o)*, *Reg. v. Bristol Railway Company (p)*. This conviction was bad on the face of it, for it awarded a fine of 5s., and in default of payment forthwith, imprisonment for five weeks—the "*Police Offences Statute*," section 63, authorising only one month. The conviction was also bad, because in form a mere civil adjudication, instead of a penal conviction in a *quasi* criminal matter—and for other causes.

Secondly, it is contended on the "*Justices Statute*," sections 150 and 139, that a distinction is made between a mere determination prior to conviction, and the conviction itself. In such cases there is only a preliminary determination; from that determination specifically, the dissatisfied party appeals to the Supreme Court. Pending the appeal, all proceedings below are suspended, and any proceedings wrongfully taken are nullities; and when the ultimate decision of the Supreme Court is to reverse the determination

(*) 7 Ad. & Ell., 583. (o) 5 Ell. & Bl., 58. (p) 11 Ad. & Ell., 202.

appealed from, the stage of conviction can never be reached at all. In that aspect, there is in this case no conviction to quash. Again, independently of the section suspending proceedings pending the appeal, such an appeal is in the nature of a writ of error, which is of itself a stay of proceedings. *Tidd's Practice*, p. 530.

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Finally, if there were a conviction here which the statute required to be quashed, we have substantially quashed it by reversing it. *Venables v. Hardman* (q) shews that a mere reversing on appeal, has been regarded as equivalent to quashing on *certiorari*.

The other authorities cited for this side were *Prosser v. Hyde* (r), *Re Desmond* (s), *Brookley v. Warren* (t), *Rex v. Patterson* (v), *Reg. v. Chaney* (w), *Chaney v. Payne* (x), *Reg. v. Oridland* (y), *McDonald v. Bulmer* (z).

Michie, Q.C., and *Fellows*, for the rule.—There is no authority for the proposition that where a conviction is bad it cannot be brought into this Court on *certiorari*; and there is authority the other way. *Kirby v. Simson* (a). Where a magistrate purports to act under a statute, but exceeds his authority, or really acts outside the statute, he has no jurisdiction for the excess, or none at all; and though the statute takes away *certiorari*, his proceedings may be brought into this Court and quashed for their excess of authority, or altogether. Upon appeal the Court has none of the proceedings below, only a statement; it cannot quash what is not before it, and can only answer the questions expressly put, or plainly arising out of the statements in the appeal case before it. *Buckmaster v. Reynolds* (b).

(g) 1 ELL. & ELL., 79., S. C., 28,
L. J. M. C., 33.
(r) 1 T. R., 414.
(s) 5 N.S.W. Reps.
(t) 4 Ir. Jur., 235.
(v) 1 East, 298.

(w) 6 D. Pr. Ca., 281.
(x) 1 Q. B., 712.
(y) 27 L. J. M. C., 28.
(z) 13 Ir. Rep., C. P.
(a) 10 Ex., 358
(b) 13 C. B., N. S., 63.

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As to the authorities tending to shew that quashing on *certiorari*, and reversing on appeal are equivalent, they are not the *dicta*, even *obiter dicta*, of the judges, but hasty inferences of the reporters. Here was a conviction in fact, under which the Plaintiff suffered actual imprisonment; the statute requires as a condition precedent to the bringing of an action, that such conviction be quashed; such conviction could have been quashed, and has not; so the Plaintiff ought to be nonsuited.

The other authorities cited for this side were *Barton v. Bricknell* (c), *Ratt v. Parkinson* (d), *Leary v. Patrick* (e), *Laurenson v. Hill* (f), *Crepps v. Durden* (g), *Brophy v. Ward* (h).

Cur. adv. vult.

April 9. STAWELL, C. J. :—

The declaration contains three counts—two for trespass, and the third for a malicious conviction. The jury returned a verdict for the Defendant on the third count, and for the Plaintiff on the first and second; damages, one farthing, in addition to the £50 paid into Court. The question principally turns upon "*The Justices of the Peace Statute*," 28 *Vic.*, No. 267, section 164, which re-enacts, with very slight alterations, the English statute on the subject (adopted here several years ago), the 11 and 12 *Vic.*, cap. xlv., known as *Jervis's Act*. That, so far as the present point is concerned, was an alteration of an older statute, the 43 *Geo. III.*, cap. cxli., which enacted in the first section, that in the case of a conviction having been quashed, the Plaintiff shall not be entitled to more than the actual penalties; and, with no costs of suit, unless it is specially

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| (c) 13 Q. B., 393, S. C., 20 L. | (f) 10 Ir. Rep., 177. |
| J., M. C., 1. | (g) 1 Sm. L. C., 568. |
| (d) 20 L. J., M. C., 208. | (h) 4 Ir. Jur., 235. |
| (e) 15 Jur., 272. | |

alleged in the declaration that the acts were done maliciously, and without reasonable and probable cause. To enable the Plaintiff to recover substantial damages under that statute, he must, in addition to proving malice and want of reasonable and probable cause, also shew that the conviction was quashed. This section is divided into two by *Jervis's Act*, and these two sections are again subdivided into three by the present Act.

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It was urged, in shewing cause against this rule, that the necessity for "quashing" applied only to those cases where the conviction was good on the face of it, and where by extrinsic evidence it might have been shown that the magistrate had no jurisdiction, or had exceeded it. It appears to me that this construction makes the section perfectly useless and inoperative, because in such a case as that put, the Plaintiff would have been, of necessity, compelled to quash the conviction. Being good on the face of it, its existence would be a bar to the action. If, therefore, as suggested for the Plaintiff, the section only refers to instances where a conviction is good on its face, and which can only be proved invalid by extrinsic evidence, the section is useless, because the Plaintiff would have to do without it, that which it compels him to do. We see no reason to limit its operation in the way proposed. All that can be quashed must be quashed, is the plain, obvious, and necessary conclusion to be deduced from the clause. It is no excuse to say that it is useless to quash a conviction, which is bad on the face of it. That is not the meaning of the Legislature. Their object was very obvious, namely, to protect a justice, who, without malice, had exceeded his jurisdiction, or acted where he had none.

In the present case the conviction or order complained of might have been appealed from, to the general sessions, or quashed upon *certiorari*. Or even supposing that under the 140th section, there could not have

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been an appeal to the sessions, no case has been cited to shew that he might not have brought up the proceedings by writ of *certiorari*. *Certiorari* is no doubt taken away by the statute, but it is clear, according to the authorities, that where a magistrate exceeds his jurisdiction he does not act under the particular statute, and therefore the clause taking away *certiorari* does not apply. It is just the same where a magistrate acts in excess of his jurisdiction, as where he has no jurisdiction—for as regards the excess he has none. We think, therefore, that the Plaintiff has failed to shew that if an application had been made in the proper way, this conviction or order could not have been quashed. We have already said that wherever it came it might be quashed, and we think in this case it might have been so quashed.

But it is said—and I think the whole case might very well have been limited to this simple point—what was done was equivalent to a quashing. A special case, by way of appeal from the magistrate's decision, was presented to this Court, and on the hearing of it, the Court reversed the magistrate's order or judgment. But "reversing" is not "quashing." Although a decision is reversed or altered, it still remains, in a certain sense, a decision. It may be a decision totally different to that first pronounced, still it is a decision on the record of the Court that first pronounced it. Quashing is a very different operation; by it the decision is completely obliterated. It was urged that it is a mere verbal distinction—that there is no substantial difference between quashing and reversing—and two cases have been cited, in which the expression "equivalent to quashing" falls from the Court of Queen's Bench. One is *Charter v. Gream* (j). In that case, the question now at issue did not arise; there it was simply whether a magistrate having returned one conviction, and acted upon it, was at liberty to return another conviction,

(j) 13 Q. B., 216.

and thus, as it were, amend the first one, and it was held that he was not to be at liberty to cure defects in one conviction, that had been returned, acted upon, and afterwards held bad; and there, what was done was held equivalent to quashing, so far as preventing the return of an amended conviction. But no authority has been cited to shew that where the Legislature requires a conviction to be quashed, anything equivalent to a quashing will be sufficient. In the other case referred to, the Queen's Bench on a special case, held the conviction wrong, and quashed it; *Venables v. Hardman* (*k*). But the words "conviction quashed" are in italics, obviously to shew they are not the judgment, but are merely the reporter's language, stating what he believed to be the result of the decision. No doubt these reports are framed with a great deal of care, but I do not think we are bound by the conclusion of the reporters as to the effect of the judgment.

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It is also said that as section 168 of the "*Justices of the Peace Statute*" provides that no action shall be brought against a justice relative to any conviction that has been affirmed or altered, an action will lie where it has been reversed. I confess I cannot follow the argument. The obvious meaning of the section appears to me to be to protect justices during the intermediate proceedings between the conviction and the appeal, and in which the conviction is amended or held good. The conclusion to be fairly deduced from it is, not that quashing is unnecessary in every case, but that where the conviction is affirmed on appeal, an action cannot lie.

The history of the Act has been referred to for the Plaintiff during the argument, and I think, fairly, but it does not bear out his view. The Act relating to actions against justices, was passed ten years before the statute

(*k*) 1 ELL. & ELL., 79 S. C., 28 L. J., M. C., 33.

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enabling appeals to be made to the Supreme Court by special case; it is hardly to be supposed that that which was not passed for ten years afterwards was in the contemplation of the Legislature when they required convictions to be quashed before an action could be brought. Again, the duty of the Court, as clearly shewn by the Lord Chief Justice in *Buckmaster v. Reynolds*, is in these special cases simply to answer questions put by the magistrates, and nothing more. They have power to "*reverse, affirm or amend*"—not to "quash." They cannot quash convictions that are not before it; they can only be brought before it by *certiorari*. The conviction in this case was not brought before us, and therefore we could not have quashed it. But apart from that, the Legislature has expressed its views on the matter. The Plaintiff contends that he is at liberty, by means of a special case, to get all the advantages of the opinion of this Court; and all the advantages which result to him from quashing the conviction, and which are to be obtained only by an appeal to the general sessions, where it might have been quashed on the merits, or by *certiorari*, where it might have been quashed on the merits, or to this Court for a technicality. The Legislature, however, expressly says that this is just what the Appellant shall not do; it declares, by section 161, that any person applying for a prohibition or a special case, shall be deemed to have abandoned all right to appeal to the general sessions; so that if we adopt the view he contends for, we shall be acting directly in opposition to that section, and giving him the benefit of a special case, reversing the judgment of the magistrate, and in addition thereto all the advantage to be derived from an appeal to general sessions. In many cases difficulties arise in arriving at the clear intention of the Legislature; where doubtful expressions have been used, or apt words have not been adopted, or where there is a conflict between one section and another. In the present case no such difficulties present themselves. The object of the Legislature has been con-

veyed in after a technical expression, and I can see no reason why we should unnecessarily depart from our obvious duty of construing words according to their plain meaning. I think the rule ought to be absolute.

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BARRY, J.:—I am of the same opinion. Three courses are open to a Defendant who complains of a magistrate's decision—to obtain a writ of *certiorari*, to appeal to the Quarter Sessions, or to appeal to the Supreme Court by special case. The first two have not been adopted. Nevertheless, before an action can be brought against a justice, the conviction must be got rid of, although it is bad. The obvious intention of the Legislature is to prevent a conflict between two Courts; and in deciding upon the real or imaginary injury inflicted upon a person against whom a conviction remains in another Court, the second Court is not at liberty to question it. The person who complains must get rid of the determination of the first Court, and means are prescribed whereby that determination can be got rid of. There is an obvious distinction between "reversing" and "quashing." In reversing you do not touch the record, you merely alter an entry of the decision; but in quashing, the order drawn up is extinguished altogether.

WILLIAMS, J., concurred.

Rule absolute for a nonsuit.

1869.
April 6, 9.

COURTNEY (ASSIGNEE) v. KING AND ANOTHER.

C., official assignee of the estate of J., sued K. for money had and received to the use of C., as assignee, and for money due on accounts stated between K. and C., as assignee. K. pleaded never indebted; and mutual credits between J. and K., which left, before J.'s sequestration, a balance due to K., who offered to set off the moneys claimed by C., as assignee. On general demurrer,

Held, that as the moneys claimed were received by K. before the sequestration, the plea was on general demurrer as amounting to a second and argumentative traverse of the debt, a good though an unnecessary plea.

ASSUMPSIT by Plaintiff, as official assignee of the insolvent estate of *John Johnston* and *George Jonas Johnston*, insolvents, to recover £2,000 from Defendants for monies (1) Had and received by Defendants for the use of Plaintiff as such assignee, and (2) Found to be due from Defendants to Plaintiff, as such assignee, on accounts stated between Defendants and Plaintiff as such assignee.

Pleas:—(1) Never indebted. (2) That the monies claimed by the two counts were the same; and that before suit, and before the insolvency, or notice thereof to Defendants, they gave credit to the *Johnstons* to the amount of £9,123 12s. 10d., by honouring and paying their drafts, at their request, in favour of the holders thereof, and such credit became and ended in a debt due and owing by the *Johnstons* to Defendants; and that before the insolvency, or notice thereof to Defendants, the *Johnstons* delivered to Defendants, who received, cattle for the purpose and in order that Defendants might sell and receive the proceeds of the sales for and on behalf of the *Johnstons*; and that afterwards, and before the insolvency, Defendants sold the cattle and received the proceeds of the sales thereof, which proceeds are the monies so claimed by Plaintiff as such assignee. And Defendants further say that the monies so paid by them, at the request of the *Johnstons*, exceed the amount of the monies so claimed by Plaintiff as assignee; and Defendants are ready to set off and allow to him the full amount so claimed out of the monies so due and owing to Defendants as aforesaid.

Replication joining issue on the first plea.

Demurrer to the last plea as bad in substance, for that the plea is no answer to causes of action which did not accrue to the insolvents.

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Fellows for the demurrer cited *Rees v. Watts* (m).

Higinbotham (with him *Williams*), cited *Bittlestone v. Timmis* (n).

Cur. adv. vult.

STAWELL, C. J.:—

This was a plea under the "*Insolvent Act*." [His Honor read the averments.] The Plaintiff demurred on the ground that the plea was no answer to causes of action which did not accrue to the insolvents before the insolvency, but accrued to the assignee subsequent to it. The Plaintiff sues as assignee for money had and received to his use as assignee since the sequestration. The plea sets up mutual credits accrued before the sequestration—substantially. We were informed, during the argument, that the money was, in fact, received by the Defendants before the sequestration. If the Plaintiff could shew no fraudulent preference he would, if he could maintain the action at all, be obliged to sue for the money as had and received to the insolvents' use before the sequestration. In that way this plea—though the more I look at it the less I see any necessity for it—might be deemed an argumentative form of the traverse "never indebted," which, on general demurrer, would be a good plea. If the plea embarrassed the Plaintiff, there was a proper mode of causing it to be removed. The case cited of *Bittlestone v. Timmis* has no bearing on this. There, though the credit was given before, the payment was after, the sequestration.

April 9.

(m) 11 Ex., 410.

(n) 1 C. B., 389.

1869.

April 9.

The official assignee of an insolvent Crown lessee under the "Amending Land Act 1865," is, after the expiration of the first three years of the term of the lease entitled to be registered as assignee of the lease by operation of law,

THE QUEEN *v.* THE BOARD OF LAND AND WORKS, *Ex parte* JACOMB.

RULE *nisi* for *mandamus* to compel the Board of Land and Works to register *Jacomb* official assignee of *McArdell*, an insolvent, as assignee of a Crown lease, granted to insolvent under sections 13 and 14 of the "Amending Land Act 1865."

The lessee, *McArdell*, had made application for, and obtained, the necessary certificate under section 14 (iv), for improvements valued at £1,006, and his estate was compulsorily sequestrated before the expiration of the first three years of the term (within which an assignment by the lessee is prohibited under the Act). After the three years had expired, *Jacomb*, his official assignee, applied to be registered as an assignee by operation of law, under section 22, and to have the land put up for sale under section 16. Both applications were refused on the ground, that under the Act, the insolvent, who had refused to concur, was, as lessee, the only person who could be recognised by the Board, and that his application was an essential preliminary to sale or assignment.

J. W. Stephen and *Holroyd* shewed cause.—The plain policy of the Act is to prevent alienation within three years by any voluntary or involuntary act of the lessee; and in securing this result, the insolvent is protected as to this property, from any interference by his creditors. There is no getting over the express language of section 22, however repugnant to preconceived ideas the result may be. It provides that no estate shall vest at law or in equity, until registration of an assignment; and that no assignment shall be registered unless the lessee, or person assigning, attends in person to direct the transfer. The official assignee can

therefore, take nothing, unless the insolvent chooses to give it him; and the insolvent refuses to give it him in this instance. The concluding proviso of section 22, prohibits registration even after the three years, of any assignment made within the three years. The word "until" in that proviso, refers to the assignment, not to its registration.

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Mackay, Lawes, and A'Beckett, in support of the rule. A voluntary sequestration would not be within the covenant against assigning the lease, and there can be no question of forfeiture as to a compulsory sequestration. Section 25 of the "*Insolvency Statute*," vests all the insolvent's estate in his official assignee, "except where it is by some law otherwise expressly provided," and the only question to be decided is, whether there is such express provision in the "*Amending Land Act 1865*," and nothing of the kind is to be found. No exception can be created by inference. As the Act expressly recognises assignments by operation of law, the provision, which if strictly interpreted, might defeat any such assignment, cannot receive such a construction. The necessity for personal attendance can only be intended to apply to the class of assignments specified in the second part of the clause, that is, to assignments by act of the lessee, and can have no application to the assignments mentioned in the first part of the clause, that is, assignments by operations of law which are '*in invitum*' as against him, and might be otherwise defeated. The present case and that of an absconding debtor, afford illustrations of the unjust and absurd consequences which follow, if section 22 is held to require the debtor's assent to an assignment by operation of law. The concluding proviso of that section merely prohibits registration within three years, not an assignment by operation of law within that period, although it delays the registration of such an assignment until its expiration. *Jacomb* did not apply to be registered until after the three years.

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STAWELL, C. J. :—

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This case seems very clear. The Board declined to give effect to an assignment by operation of law, solely on the ground that the "*Land Act*" does not justify them in doing so. The requirements of the Act have in all other respects been complied with. The right under an assignment by operation of law, must, irrespective of the "*Insolvent Act*," be taken away by express words; unless so taken away, it exists as of course, and yet so far from there being any express provision throughout the Act against such assignments, they are expressly recognised. By the 22nd section it is declared that no such assignment shall be of force until registered, and that it shall not be registered until three years from the granting of the lease. The attendance of either lessee or assignee is sufficient to obtain registration. The postponement is for an object unconcerned with the present case, and at the expiration of that period there is no option, the Board must register. The inference from this section is, that after three years, registration is imperative upon application, and the official, both as assignee, and also as representing the lessee under the "*Insolvent Act*," is entitled to make application, and to be registered as an assignee by operation of law. It is unnecessary to refer to the effect of the receipt of rent as regards the waiver of a forfeiture.

Rule absolute.

DUNN v. WALDOCK.

1869.

April 7, 8.
May 7.

RULE *nisi* to enter a suggestion on the record to enable Plaintiff to obtain the higher scale of costs in an action of trespass. The action was commenced in the County Court and removed thence into this Court on *certiorari* by the Defendant. The grievance complained of was damage done by huntsmen and hounds in hunting. The Defendant paid £5 into court, and the jury awarded £5 more. *Barry, J.*, who tried the cause, certified for costs in these terms:—"I do order that the Plaintiff's costs in this action be taxed according to the higher scale contained and set forth in the 39th schedule of the '*Common Law Procedure Statute*'" (o). The prothonotary refused thus to tax, unless Plaintiff obtained a certificate that the trespasses were "wilful and malicious" (p). *Barry, J.*, on being applied to for such certificate, refused to grant it, as he did not believe that the trespasses were "wilful and malicious." At the trial a notice from Plaintiff's attorney was proved (the original being produced by the Defendant), requiring £5 damages for the injuries done, and warning Defendant not to trespass again. This letter was dated 28th July, 1868, and there was a conflict of affidavits as to whether it came personally to the defendant before or after the trespasses (second ones suffered by Plaintiff), in respect of which this action was brought.

D. sued *W.* in the County Court for damage done in hunting. *W.* removed the action into the Supreme Court on *certiorari*, and paid £5 into Court. The jury awarded £5 more. The Judge certified for the higher scale of costs. The prothonotary refused to tax unless on a special certificate that the trespasses were "wilful and malicious," which the Judge refused to give. A notice not to trespass had been, before the trespass sued for, sent by plaintiff to defendant, but it was a matter of contest whether it was

received by the defendant before the trespass sued for. On rule *nisi* to enter a suggestion on the record, to enable plaintiff to obtain the higher scale of costs, it was contended for plaintiff that the action, though "brought into" the Supreme Court on *certiorari* by the defendant, was not originally "brought in" that Court by the plaintiff; and that as the trespasses were after notice, plaintiff ought to have his costs.

Held, firstly, that the action was brought in the Supreme Court when it was brought into it by *certiorari*; and secondly, that as the plaintiff's evidence only shewed that the letter might have reached the defendant within the necessary time, while the defendant explicitly swore that it did not reach him till long afterwards, the Court ought not to allow the question to be further tried by suggestion on the record and traverse thereon, and rule *nisi* discharged.

(o) No. 274, sec. 440, sch. xxxix. (p) No. 274, sec. 429, adopting 3 and 4 *Vic.*, cap. xxiv.

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v.
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Higinbotham for the Plaintiff.

Fellows and *Madden* for Defendant.

For the Plaintiff it was urged that he was entitled to costs on two grounds—first, because the trespass was committed after notice; and next, because the Act 3 and 4 Vic. did not apply to cases brought from the County Court by a Defendant. The words of the Act are:—"If the Plaintiff in any action of trespass brought or to be brought," in any of the Supreme Courts, "shall recover by verdict of the jury 40s. [£10 in this colony], such Plaintiff shall not be entitled to recover or obtain from the Defendant in respect of such verdict any costs whatever, unless the judge before whom such verdict shall be obtained shall immediately afterwards certify that the action was really brought to try a right besides the mere right to damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious." Section 3 provides "That nothing herein contained shall extend to, or be construed to extend to, deprive any Plaintiff of costs in any action for trespass upon premises in respect of which any notice not to trespass thereon shall have been previously served by or on behalf of the owner or occupier of the land trespass passed over, upon or left at the last reputed or known place of abode of the Defendant."

For the Defendant it was answered that the affidavit did not sufficiently state that the Defendant had been served with notice. It is true he produced a notice, but he may have got it after the trespass complained of. In respect to the other point, the Act says "any action brought." Now, this action, though commenced in the County Court, was brought in the Supreme Court; and the Act makes no distinction as to where the actions are commenced.

In reply it was urged for the Plaintiff that the production by the Defendant of the notice of July, 1868, was sufficient evidence that he received it; but if the Court required further evidence, it would be supplied. As to the other objection, the case could very well have been tried in the County Court; the Plaintiff brought it there; the Defendant removed it to the Supreme Court; but it was not "brought" in the latter Court by the Plaintiff.

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The authorities referred to on both sides were—*Dodd v. Wigley* (q), *Johnson v. Ward* (r), *Flint v. Hill* (s), *Vaux v. Vollans* (t).

The case was mentioned again, more than once on the facts, and additional affidavits were, at the suggestion of the Court, filed on both sides.

STAWELL, C. J.:—The action was "brought" in this Court on being transferred to it by *certiorari*; at least, it was then "brought" in this Court, so far as concerns the intention of the Act, which vests in a judge a discretion to determine whether it is a case for the higher scale of costs or not.

On the other question we reserve our judgment.

STAWELL, C. J.:—The Plaintiff obtained a rule *nisi* for leave to enter upon the record a suggestion that the trespasses complained of were committed after notice, and that Plaintiff was, therefore, entitled to costs. The affidavits in support of the application showed that the notice was in the form of a letter, which was left at Kirk's Bazaar for the Defendant, who was said to call there daily. At the trial the Defendant admitted he had received the letter, but he was not asked when. An answering affidavit, made by the Defendant

May 7.

(q) 7 C. B., 106.
(r) 1b. 868.

(s) 11 East., 184.
(t) 1 N. & M., 307.

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himself, states distinctly and explicitly that he received the notice, not from the bazaar—that he had not called there—but that the notice was forwarded to him by post, and did not reach him till long after the trespasses were committed. The suggestion, if entered upon the record, can, no doubt, be traversed; and we have been invited to allow it to be entered in order to have the matter tried if we do not consider the Plaintiff has sufficiently proved his statement. If there was a conflict of evidence, or if the mere fact of knowledge of this notice was sufficient when it once reached the Defendant's hands, the suggestion might be entered. But we have to be satisfied in explicit terms, not only that the document was delivered personally to the Defendant, or left at his usual place of abode, but also that it was delivered, or left, or reached him before the trespasses were committed. Giving the most perfect credence to the statements for the Plaintiff, the utmost to which they may be put is that it is possible the letter may have reached Defendant within the necessary time; but it is consistent with those statements that it did not so reach him, and we have his explicit statement that it did not. We cannot allow, on such a state of facts, a question to go to the jury. It is not a question of credibility on one side or the other; but on one side there is a mere possibility, and on the other an explicit and distinct denial. Under these circumstances, we must refuse the application.

Rule discharged.

END OF EASTER TERM.

EASTER VACATION, 32 VICTORIÆ.

IN THE MATTER OF HUGH GLASS.

[IN CHAMBERS] (v).

1869.

May 1.

IRELAND, Q.C., on April 30th, obtained from *Stawell*, C. J., in Chambers, a Writ of *habeas corpus* requiring the keeper of Her Majesty's gaol, at Melbourne, to bring before this Court the body of *Hugh Glass*, with the day and cause of his being taken and detained, &c., to undergo, &c.

On May 1st the governor of the gaol brought before *Stawell*, C. J., in Chambers, Mr. *Hugh Glass*, and made the following return:—

"I, *John Buckley Castieau*, governor and keeper of Her Majesty's gaol, at Melbourne, in the colony of Victoria, in the writ in the schedule annexed named, do certify and return unto our Sovereign Lady the Queen, that before the coming to me of the said writ, that is to say, on the 30th day of April, 1869, *Hugh Glass*, in the said writ also named, was committed to my custody by virtue of a certain warrant of commitment, to the tenor and effect following:—

"To the sergeant-at-arms of the Legislative Assembly of
"Victoria, and to the keeper of Her Majesty's gaol,
"Melbourne.

"Whereas the Legislative Assembly of Victoria did, on the 27th day of April instant, resolve that *Hugh Glass* and *John Quarterman* were guilty of contempt and breach of the privileges of the said Legislative Assembly, and whereas the said Legislative Assembly hath this day adjudged that the said *Hugh Glass* and *John Quarter-*

therefore, limited powers only, the warrant should contain averments, or state grounds, to shew that those powers had not been exceeded; that the warrant was therefore bad; and prisoner discharged.

(v) Coram *Stawell*, C. J. advised with *Stawell*, C. J., before
Barry, J., and *Williams*, J., also he gave his judgment.
sat and heard the argument, and

A warrant of commitment by the Legislative Assembly for contempt, recited that the Legislative Assembly did on, &c., resolve that *H. G.* was guilty of contempt and breach of the privileges of the said Legislative Assembly, and that the Legislative Assembly had adjudged that he be, for the said offence, taken into custody, &c.

Held, on *habeas corpus*, that inasmuch as the Assembly had only such privileges as were enjoyed by the House of Commons in 1855, and possessed,

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“ ‘man be, for the said offence, taken into the custody of the sergeant-at-arms of the Legislative Assembly, and by the said sergeant-at-arms delivered to and kept in Her Majesty’s gaol, Melbourne, during the pleasure of the said Legislative Assembly; these are, therefore, to require you, the said sergeant-at-arms, forthwith to take into your custody the bodies of the said *Hugh Glass* and *John Quarterman*, and them safely to convey to Her Majesty’s gaol, Melbourne aforesaid, and there deliver them to the keeper thereof. And you, the said keeper of the said gaol, to receive the said *Hugh Glass* and *John Quarterman* into your custody in the said gaol, and them safely to keep during the pleasure of the said Legislative Assembly. And all sheriffs, deputy-sheriffs, constables, and other officers, are hereby required to be aiding and assisting to you in the execution hereof; and for so doing this shall be your sufficient warrant.

“ ‘Given under my hand, this 29th day of April, A.D. 1869.

“ ‘FRANCIS MURPHY, Speaker.’

“ And that while I was detaining the said *Hugh Glass* in custody, as aforesaid, for the purposes aforesaid, I received a certain other warrant, to the tenor and effect following:—[The warrant was in precisely the same language, with this exception, that it contained the name of *Hugh Glass* only, and not those of *Glass* and *Quarterman*]. And these are the causes of the detaining of the said *Hugh Glass*, whose body I have here ready, as by the said writ I am commanded.

“ J. B. CASTREAU, Governor and Keeper.”

Ireland, Q.C., then moved that the return should be filed, which being done, he moved that Mr. *Glass* should be now discharged.

Ireland, Q.C. (*Adamson* and *Hearne* with him), in support of the motion.—Both these warrants are invalid, they not being under seal. In *Coke’s Second Institute*, there are a number of regulations on Magna Charta. One of them, at p. 52, runs as follows:—“ Now, seeing that no man can be taken, arrested, attached, or imprisoned, but by due process of law, and according to the law of the land, these conclusions hereupon do follow:—First, that a commitment by lawful warrant, either in deed or in law, is accounted, in law, due process or proceeding of law, and by the law of the land, as well as by process by force of

"the King's writ. Second, that he or they which do com-
"mit them have lawful authority. Third, that his warrant
"or mittimus be lawful, and that must be in writing under
"his hand and seal." In 2 *Hawkins' Pleas of the Crown*,
134, referring to a justice's warrant, section 21, it says,
"It ought to be under the hand and seal of the justice who
"makes it out." A warrant is a document known to the
common law, and there are certain requirements which
must be complied with to give it validity, one of which is
that it must be sealed.

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Apart from that technical objection, my first proposition
is that a general warrant, not specifying the offence for
which the person named in it is incarcerated, is, at common
law, bad. I concede that the documents now put in, viz.,
these two warrants of commitment by the Speaker, if a seal
were affixed to them, would be sufficient in the House of
Commons. *Dill v. Murphy* (w) does not determine any-
thing directly upon the present case. In that case there
was a general warrant and also a special warrant, which set
out *in extenso* a certain libel, which was the breach of pri-
vilege alleged in the general warrant, and there were also
all the customary averments of the party having been
summoned, appeared, and been adjudged and found guilty.
In the present case there are two warrants, both appearing
to be general warrants. Two persons are included in one
warrant, and only one in the other; that is the only differ-
ence between them. Neither of them contains any allega-
tion showing the offence that Mr. *Glass* has committed to
render him guilty of contempt.

With regard to warrants of commitment by superior
courts of common law, one superior court will not enquire
into a general warrant of another superior court; and the
House of Commons, which originally formed a portion of
the Aula Regis, or High Court of Parliament, and which

(w) 1 W. & W., L., 342.

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afterwards became separated from the House of Lords, retained the right of commitment, which originally belonged to the High Court of Parliament. The presumption is that Parliament will always act rightly; and out of respect to that the courts never make any enquiry. The House of Commons can do what is illegal, by not disclosing the offence committed, but another Court will not presume that the House of Commons will have recourse to action of that kind. But it is different when we come to deal with a body constituted by Statute; and herein lies the distinction between a general warrant issued by the House of Commons and a general warrant issued by a Colonial Legislature like our own. Our "*Constitution Act*" confers power to make laws for the Colony, and proceeds in section 35 to give the power to define the privileges of Parliament, which are not to exceed those possessed by the House of Commons at the time of the passing of the Act, the 16th July, 1855.

In accordance with the power conferred in that Act, the local Legislature, by Act 20 *Vic.*, No. 1, proceeded to declare that the privileges of the Legislative Assembly should be identical with those of the House of Commons at the date of the passing of this Act; for they could not, of course, confer greater powers than the 35th section allowed. I submit that they are a mere legislative body, having no pretensions to judicial powers; that they would have had, at common law, and independent of the "*Constitution Act*," merely the right to preserve order within their own doors; to expel persons offending against decorum, and interrupting proceedings; and that any further powers or privileges they may have are derived solely under the statutory enactment. That shows the distinction between a warrant issued from the High Court of Parliament and a warrant issued from the Legislative Assembly of Victoria, which has a mere enlargement of the common-law power by Statute. If the warrant in this case be sufficient, the

Supreme Court, which is bound to administer the laws—and this 35th section of the “*Constitution Act*,” as every other Act—could be fairly hood-winked by a thing which has no pretension to call itself a Court, which is a mere legislative body with a protective power by Statute. In point of fact, the limitation by the 35th section of the “*Constitution Act*” is gone if these persons can assume a jurisdiction by refusing to set forth in their warrant what privilege has been violated, or what contempt has been committed. With regard to the procedure here upon that warrant, in reference to carrying out the powers, privileges, and immunities, it may be said the privileges of the House of Commons have passed to the Legislative Assembly; but I submit that the right of issuing a general warrant is no power, privilege, or immunity which has passed here. All that has passed is the powers, rights, and privileges of the House of Commons; but their procedure has not come along with that grant. Their procedure by special warrant may have come, but the limited jurisdiction delegated precludes the idea of the importation of the power to issue a general warrant, because it would affect the limitation itself. *Doyle v. Falconer* (x), decided that at common law the Legislative Assembly of Dominica does not possess the power of punishing a contempt though committed in its presence and by one of its members. Such authority does not belong to a Colonial House of Assembly by analogy to the *lex et consuetudo Parliamenti* which is inherent in the two Houses of Parliament in the United Kingdom, or to a Court of justice, which is a Court of record, a Colonial House of Assembly having no judicial functions. The cases of *Kielley v. Carson* (y) and *Fenton v. Hampton* (z) decide conclusively that Legislative Assemblies in the British colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts when committed beyond their walls, but an inherent right to prevent dis-

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(x) L. R., 1 P. C., 328.

(y) 4 Moore, P. C. C., 63.

(z) 11 Moore, P. C. C., 347.

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order in their own proceedings, and a limited jurisdiction consequently at common law. In this case we have a limited statutory jurisdiction, and the difference of the extent makes no difference. The principal is the same, that wherever a limitation exists, a special warrant is in all cases necessary, in order that the Court may determine whether the limitation has been overstepped.

As was said in *Doyle v. Falconer*.—"The warrants having "been issued by virtue of an alleged authority which, if it "existed, was confessedly a limited one, ought to have "shown on the face of them that the alleged contempt was "committed in the presence of the House, and so fell "within the limits of that authority." Now as this is a limited authority, conferred by the 35th section of the "*Constitution Act*"—limited to the extent of the privileges which were possessed by the House of Commons on the 16th July, 1855—these warrants should have shown that a privilege was violated which was a privilege of the House of Commons on the 16th July, 1855. Why should this Court assume that the privilege violated was a privilege of the House of Commons in 1855 any more than in the other case? The transfer of the powers of the House of Commons carries with it nothing more nor less in the shape of procedure than is incidental to the nature of the grant. There is no direct transfer of any power. It would be monstrous to transfer a portion of a power expressly limited, and at the same time to transfer a form of procedure which would enable the body on whom the powers were conferred to assume powers unlimited. The powers, privileges, and immunities themselves do not imply process; whatever is incidental to a grant passes with it, and certainly what will defeat the grant will not go with it. A body exercising the powers conferred by such grant will not get credit as a judicial body would get for not exceeding their jurisdiction; they must show that they have not exceeded it, and the Court will not assume that they have kept within it. This

Court will look behind an Act of Parliament passed by the Colonial Legislature—*Bank of Australasia v. Nias* (a)—and, *a fortiori*, they will look behind a warrant issued by one branch of it. The Courts at Westminster will not examine an Act of Parliament, because the Parliament of England is omnipotent to make its laws. An Act of Parliament there, with the Queen's assent, concludes the judge; he cannot go behind that. It is not so here; and if an Act of the Legislature, including the assent of the Queen, is examinable in this country, on what principle is a warrant free from examination? These warrants are both clearly bad, because this Court cannot tell whether they are good or bad.

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The warrant here is not like that in *Dill v. Murphy*, in which there was a commitment to the custody of the Sergeant-at-Arms, but is a commitment to the gaol at Melbourne. Now the transfer of privilege, power, and immunity which was effected by the "*Constitution Act*," does not give an authority to this body to fish out some analogous establishment to Newgate or the Tower in this Colony of Victoria. The powers conferred need not fail for want of a means of carrying them out, because there is a Sergeant-at-Arms, and in point of fact the defendant is in custody of the Legislative Assembly itself. I wish to know if this man could be sent to the Penal establishment at Pentridge or to the hulks. I submit not; and that no such thing has been imported into this country as the power of sending a man to the common gaol by a vote of the Legislative Assembly.

Michie, Q.C. (*Billing* with him), in support of the return.—The first preliminary objection taken on the other side, is that the warrant is bad because it is not under the seal of the Speaker, which proceeds upon the assumption, first, that there is a seal of the Speaker which could be affixed to warrants of this kind. [*Barry*, J.—In *Dill v.*

(a) 16 Q. B., 717.

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Murphy the warrant was under the seal of the Speaker (b).] If there be such a seal, at the utmost the omission of it is a mere matter of form, and in a proceeding of this kind, your Honors will not think any force attaches to it. They challenge its sufficiency for the want of that which is merely form and not substance. In the case of *Sir John Cam Hobhouse* (c), *Abbott*, C. J., said:—"We cannot inquire into the form of the commitment, even supposing it is open to objection on the ground of informality."

It is contended that this proceeding of the Legislative Assembly is to be dealt with as if it was some Court of inferior jurisdiction. I apprehend there is no distinction more patent or conspicuous, or more frequently cited in the Courts (as we are arguing as a matter of Courts), than that between the jurisdiction of superior and inferior Courts. The jurisdiction of the latter, of course, always being limited, and being required to be set out upon the face of the warrant; and the jurisdiction of the former not being required to appear upon the face of the warrant. Inasmuch as our Act conferred upon the Legislative Assembly the privileges of the House of Commons in July, 1855, as far as the House of Commons is a Court at all, it is unreasonable to say that those privileges are not incidental to, and necessarily involved in, the character and functions of the Assembly; and although the Assembly is not part of a Court in a judicial sense in which your Honors understand that expression, yet the Legislative Assembly is a body which not merely possesses, as I contend, but *ex necessitate* must possess, to be able to carry out its functions, the powers and privileges of commitment as largely as they are possessed by the House of Commons itself, and that I apprehend to have been given by the Colonial enactments sufficiently defining their privileges. The two positions stand quite independent of each other. Conceded that the Legislative Assembly is not part of a Court in the

(b) *Vide* 1 Wy. & W., L., 171. (c) 2 Chitty, 207.

sense that the House of Commons is part of a Court, yet I contend that the reasons which make it necessary that the House of Commons shall have, and does possess, the power of commitment for contempt *extra muros*, are equally applicable to the Legislative Assembly of Victoria. The case of *Dominica* has been contended for, as being on all-fours with the present case; but the very judgment itself draws a marked distinction between the functions of the Assembly of that ceded or conquered Colony and the functions of the Legislative Assembly of Victoria, as largely conferred upon them by the enactment which empowered the Assembly. It is confounding what is not to be confounded here, to say that this is a sort of *quasi* inferior Court (for that really is the effect of the contention on the other side), which is required to set out upon the face of its warrant all the circumstances which the Assembly relies upon as constituting the special contempt. It would not merely be absolutely inconsistent with the enactment giving the privileges of the House of Commons, but it would be flying in the very face of the decision of this Court in the case of *Dill*, as also of the ultimate appeal, to say that, although ostensibly these large powers have been given, the means of carrying them out are not given. Where a power is conferred, there is no legal position clearer than that all the means that are incident and necessary to the execution of that power go with and accompany it. If the argument is to be accepted as a successful one on the other side, then, in point of fact, the Assembly have not got the privileges of the House of Commons; for there is no position clearer than this, that the Court will not enquire into a warrant of the House of Commons. That is solemnly decided in the *Sheriffs of Middlesex* case (*d*), where the Sheriffs of Middlesex were brought up before the Court of Queen's Bench, having been committed by the House of Commons, the return to the commitment merely alleging in general terms a commitment for contempt. Although every member of that Court knew of

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(*d*) 11 A. & E., 809.

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course, within his own breast, that the Sheriffs stood before them committed by the House of Commons for a contempt, which contempt actually consisted merely in obeying a warrant of the Court of Queen's Bench, the Court itself nevertheless felt compelled with reference to the privilege which the House of Commons possessed of returning a contempt upon the warrant, to send the men back to prison for obeying the command of their own Court. In a late case, where a Court, which is certainly inferior in dignity and power to the Court of Queen's Bench, committed for contempt a case which occurred in the Isle of Man, *In re Crawford* (e), it was held that the Chancery Court of the Island having authority to commit for contempt, and having adjudged the publication of an article in a newspaper to be a contempt, the Court of Queen's Bench could not review that adjudication, and that the warrant, being in the form used by the Chancery Court of the Isle of Man, was lawful, though the commitment was not for a certain time.

Before I quit this branch of the case I must demur to the phraseology used on the other side, characterizing these warrants as general warrants. What generality is there about this warrant? It is precise as to the individuals, and as to the description of their offence. The generality merely consists in this, and the only suggestion for so describing the warrant is this, that it has not set out the grounds which were dealt with by the Legislative Assembly in adjudicating this matter to be a contempt; that it proceeds to do, as in the case of the Isle of Man, and as any Court does, to state in distinct terms, that a contempt has been committed; and so precise is the law upon that, that the sufficiency of the contempt, where it is sufficiently expressed, and the averments declare contempt to be committed, is only to be dealt with by the Court itself, for it is impossible that another Court can always know what are the terms of contempt. If this form of warrant could not

(e) 13 Q. B., 618; S. C., 18 Jur., 955.

be permitted, then a thing would be nominally or ostensibly given without the means of carrying it out; for it would be saying, you must enforce these privileges by a different vehicle altogether from that which the House of Commons exercises—so different a vehicle, in fact, that it must be as mean and low as that of any Court of inferior jurisdiction, which must show to the Supreme Court the grounds on which it proceeded. The judgment asked for is to degrade this branch of the Parliament of Victoria to the level and position of an inferior Court.

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Then, in reference to the next position contended for, that this has been a commitment to a wrong prison—that, in other words, the Assembly here have been trying to improvise a sort of Tower of London or State prison. I apprehend, that neither Newgate, nor Bridewell, nor the Gate-house, nor the Queen's Bench, nor the Fleet, nor any other prisons which have been resorted to at home, can be generically or better described than as various gaols of Her Majesty in England. The House of Commons has, at different times, as appears by its journals, committed persons to the Tower, to the prison called Little-Ease in the Tower, to the Serjeant, to Newgate, to the Gate-house, to the King's Bench, to the Fleet, to the Marshalsea, to the Bridewell, to the New Prison, Middlesex, to Gresham College, to Winchester House, to the Lord Mayor's prison in Southwark, to Lambeth House, to Lord Petre's House in Aldersgate Street. They can make their own prison. Equally in those cases it might have been averred—take, for instance, the Fleet or Bridewell—that the Sergeant-at-Arms of the House of Commons is no functionary to do anything within the walls of the Fleet or Bridewell; and that, inasmuch as he is merely an instrument of the House, and the prisoner has been committed to him, he could not part with him at all. But the journals show that the House of Commons can direct their Sergeant-at-Arms to lodge a prisoner in what the House considers to be the

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appropriate prison; and, therefore, here we certainly are not using any strained analogy when we say that the Melbourne gaol is merely identical with those prisons in England, and not distinguishable in any way from them.

Ireland, Q.C., in reply.

The following cases were also cited or referred to in the course of the argument—*Stockdale v. Hansard* (f), *Gossett v. Howard* (g), *Ex parte Cross* (h), *Ex parte Smith* (j), *Rex v. Suddis* (k), *In re Carus Wilson* (l), *In re Clarke* (m), *In re Brown* (n).

Their Honors conferred together.

STAWELL, C. J.—This case is of very great importance, not merely as involving the liberty of the subject, but also as relating to matters of extreme moment to our Parliament. I have, therefore, considered it necessary to ask the assistance of my brother Judges. The case has been very fully argued. We have conferred together, and have no hesitation as to the conclusion at which, on one point, we ought to arrive, and that point, in our opinion, disposes of the whole matter. Were I to consult my own wishes merely, I should, in a case of such moment, have postponed judgment, in order to put my views in writing; but as I should be thus unnecessarily detaining the prisoner in custody, I do not feel at liberty so to do. I have, therefore, felt it my duty at once to express verbally my opinion.

The Act of Parliament which defines the privileges enjoyed by the House of Assembly, confers on that House the privileges of the House of Commons, as they existed in

(f) 9 A. & E., 1.
 (g) 10 Q. B., 359.
 (h) 26 L. J., M. C., 28.
 (j) 27 L. J., Ex., 340.

(k) 1 East, 306.
 (l) 7 Q. B., 984.
 (m) 2 Q. B., 619.
 (n) 33 L. J., Q. B., 193.

the year 1855. Those which had been in use before, and which had fallen into disuse, and those which had not then come into existence, evidently did not pass; and there can be no question that all did not pass. In fact, in *Ex parte Dill*, and in *Dill v. Murphy*, it was so conceded. Our Parliament have, therefore, got only such privileges as were enjoyed by the Commons House of Parliament in 1855; in other words, they possess limited powers. It is necessary, in the event of any person being incarcerated in the exercise of those powers, for some tribunal to have the means of ascertaining whether the limits have been exceeded or not; and unless the warrant of commitment, or document by which the prisoner is incarcerated, discloses certain facts, or contains certain averments from which some tribunal may arrive at a decision upon the point, it is impossible to know whether the limits have been adhered to or exceeded.

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On this very plain ground, it appears to me to be essential that the warrant should contain statements somewhat similar to those set out in the warrant in *Dill v. Murphy*, which is known as the special one; or should contain some general averment or averments equivalent thereto. It is quite unnecessary to affirm which is the proper course, or which would be sufficient. Both are absent here; and for this reason it appears to me that the warrant is bad and cannot be cured.

The argument with reference to the right of this Court to examine into Acts of the Legislature is strictly applicable. If this Court can examine into the question whether the powers conferred upon the Parliament legislating for this country have been exceeded or not, it does seem to me almost to dispose of the question; for if it can consider whether an Act of Parliament is within the powers of legislation conferred upon the House, it can of necessity, by parity of reasoning, consider whether a warrant issued

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within that limited jurisdiction is within that jurisdiction or not. In this view it is unnecessary to determine whether the Act, passed by powers conferred by the British Parliament, has given the Parliament in this country the position of a Court; or precisely what position that Act does confer upon them, as regards their being a Court, enabling them to commit for contempt. My decision in no way rests upon that point. Whether a Court or not, or whether a Court of higher or co-ordinate jurisdiction, it is unnecessary to consider. They are still exercising limited powers; and upon that ground I consider that the warrant should contain averments, or state the grounds which show that the powers have not been exceeded. This disposes of the whole matter, and I therefore abstain from giving any opinion upon the other points alleged. I think the prisoner is entitled to his discharge.

Prisoner discharged.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,
AT LAW.

IN

TRINITY TERM, 33 VICTORIÆ.

The Judges who sat in Banc in this Term were—

STAWELL, C. J.
BARRY, J.

WILLIAMS, J.

SHELDRIK, APPELLANT, *v.* AITKEN AND
BOSTOCK, RESPONDENTS.

AITKEN AND BOSTOCK, APPELLANTS, *v.* SIMSON,
OFFICIAL ASSIGNEE OF WESTBURY, RESPONDENT.

1869.

March 25.
June 21.

APPEAL cases stated by the Judge of the County Court at Warrnambool. The main facts of each case were the same, and as follows:—*Westbury* being indebted to *Sheldrick* and other creditors, and being pressed by *Sheldrick* for payment, gave him an order upon *Aitken* and *Bostock*, directing them to pay *Sheldrick* £158 6s. 5d. out of the proceeds of wool belonging to *Westbury*, entrusted to *Aitken* and *Bostock* for sale. *Westbury* was not in contemplation of insolvency when he gave the order, but he became insolvent within sixty days afterwards. The wool was not sold till after the insolvency, and the order, if paid to *Sheldrick*, would in fact have given him a preference

A payment within sixty days of insolvency is not void under the "*Insolvent Act*," sec. 31, if merely it has the effect of preferring the payee to another creditor. The preference must be fraudulent to make it void. It is not fraudulent if made under

compulsion. Former cases reviewed, and *Douglas v. Simson* reversed.

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 —
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over the other creditors. *Simson*, the Official Assignee, and *Sheldrick* both sued *Aitken* and *Bostock* for the amount of the order. The Judge of the County Court held that the preference, though not fraudulent, made the order void. He non-suited *Sheldrick*, and gave judgment for *Simson*, stating these two appeal cases.

The order given by *Westbury* was as follows:—

“Warrnambool, 7th December, 1866.

“To Messrs. *Aitken* and *Bostock*,

“Please pay to Mr. *Walter Sheldrick*, out of the proceeds of my wool now in your hands for sale, the sum of £158 6s. 5d., money due by me to him.

“GEORGE WESTBURY.”

This was endorsed.

“Warrnambool, December 8, 1866.

“We accept this order, and promise to pay the same provided the net proceeds of wool realise sufficient to cover all advances made by us, together with all charges.

“AITKEN & BOSTOCK.”

Westbury became insolvent January 11, 1867. The net proceeds of the wool over and above the charges and expenses of the holders, was £136 6s. 4d. In each case *Westbury* swore as follows:—

“I never dreamed of my insolvency when I gave the order to Plaintiff. When I gave the order I was in debt. *Sheldrick* was pressing me to pay an overdue acceptance. He had threatened legal proceedings. I gave the order to gain time. *Sheldrick* is not a friend of mine. Had not assets to pay all my creditors. No creditors were pressing me.”

Sheldrick proved in each case that he had already, when he obtained the order, instructed his attorney to proceed against *Westbury* on his overdue acceptance.

Higinbotham (with him *Molesworth*) for the Appellant (*Sheldrick*), and *J. W. Stephen* for the Respondents (*Aitken* and *Bostock*) in the first case.

J. W. Stephen (with him *Molesworth*) for the Appellants (*Aitken* and *Bostock*), and *Fellows* for the Respondent (*Simson*) in the second case.

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—
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In the first case it was contended for the Plaintiff below, *Sheldrick*, firstly, that the "*Insolvency Statute*," sec. 31, only renders alienations void as against the assignee, and that as he was not a party to this action that ground of defence was not open; and, secondly, that as the order was given to him under pressure it was not fraudulent, and if not a fraudulent preference not a void preference. In this case it was contended for the Defendants below, *Aitken* and *Bostock*, that the order was void, because a preference of *Sheldrick*, though not necessarily a fraudulent one.

In the second case it was contended by counsel for the Plaintiff below (*Simson*) that any preference was void, whether fraudulent or not, and the strongly expressed views of *Molesworth*, J., and the decision of the Judges of the Supreme Court of New South Wales, were cited in support of this view.

The authorities referred to were *Walker v. Rostron* (o), *Griffin v. Weatherby* (p), *Braithwaite v. Pascoe* (q), *Courtney v. Wilson* (r), *Bank of Australasia v. Harris* (s), *Nunes v. Carter* (t), *Humphrey v. McMullen* (v), *Morris v. Flower* (w), *Douglas v. Simpson* (x), and *Cannan v. Wood* (y).

Cur. adv. vult.

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| (o) 9 M. & W., 411. | (t) L. R., 1 P. C., 347. |
| (p) L. R., 3 Q. B., 758. | (v) 7 N.S.W. Rep., 84. |
| (q) 5 Shadforth, 28. | (w) 2 <i>Ib.</i> , 196. |
| (r) <i>Ante</i> , Vol. I., L., 110. | (x) <i>Ante</i> , Eq., 33. |
| (s) 15 Moore, P.C.C., 97-116. | (y) 2 M. & W., 465. |

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 —
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STAWELL, C. J., read the judgment of the Court as follows:—

Two special cases by way of appeal from the County Court at Warrnambool, each involving substantially the same question; both may therefore be considered together. From the evidence it appeared that on the 7th December, 1866, *George Westbury* drew on the Defendants, *Aitken* and *Bostock*,—in favour of the Plaintiff (*Sheldrick*)—for a sum of £158 6s. 5d., to be paid out of the proceeds of certain wool belonging to *Westbury*, then in their hands. This draft was accepted conditionally on the net proceeds being sufficient to cover all advances made by the acceptors, together with all charges, &c. On the 31st of the same month, the estate of *Westbury* was placed under sequestration, and the Plaintiff (*Simson*) appointed official assignee. The proceeds of the wool referred to, after payment of all advances and charges, amounted to £136 6s. 4d., and this sum, when the plaints were filed, was in the hands of the Defendants, *Aitken* and *Bostock*. There was evidence that at the time of drawing this draft, the insolvent was indebted to several persons, and that the giving it had the effect of preferring *Sheldrick* to his (*Westbury's*) other creditors. There was also evidence of pressure on the part of *Sheldrick*, sufficient to prevent the draft being deemed a fraudulent preference. Both plaints were against the same Defendants. The first by *Sheldrick* to recover the amount of the draft, or so much as remained to the credit of *Westbury* after the deductions already mentioned in it. On proof of the above facts, a non-suit was directed. The second by *Simson*, as official assignee of *Westbury's* estate, to recover the same amount. In it, on like proof, a verdict was given for the Plaintiff, damages £136 6s. 4d. The correctness of these decisions depends on whether, according to the facts proved in both cases, the draft was void or not; and this in its turn depends on whether a fraudulent preference is essen-

tial to render such a draft void under the 81st section of the "*Insolvent Act*," 28 *Vic.*, No. 273. Hitherto, both the Court of New South Wales and this Court have held that under this section, which is a transcript of the 8th section of the first "*Insolvent Act*," 5th *Vic.*, No. 17, a transfer or assignment, &c., is void if it fall within any of the classes expressly described, and has the effect of preferring one creditor to another, and that these latter words do not imply a fraudulent practice. This construction of the section was said to have been overruled by the Judicial Committee of Her Majesty's Privy Council in the two cases of *The Bank of Australasia v. Harris* and *Harris v. The Bank of Australasia*.

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On the argument of *Courtney v. Wilson*, we postponed our judgment in order to consider the regular report of those cases, and although it was not necessary, according to the facts proved in it, to decide whether the words "having the effect of preferring," &c., necessarily implied a fraudulent preference, yet it appeared to us that as the decision of the Privy Council was based on other grounds, the opinion expressed as regards the construction of the words referred to, was not to be regarded as a conclusive determination on the point. Since then, however, *Nunes v. Carter* has been decided by the same Court, and that decision, and all the other authorities bearing on the point, have been very fully considered both by the Supreme Court of New South Wales in several cases, terminating in that of *Humphrey v. M'Mullen*, and by this Court, in its equitable jurisdiction before the primary Judge, in *Douglas v. Simson*, both Courts feeling at liberty, notwithstanding the decisions of the Privy Council, to adhere to the opinion previously entertained. We have given these cases, and the reasons assigned by the Courts, our full attention; but we are unable to concur in the conclusion which they deduce from the judgments of the Privy Council. It appears to us necessary, in

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order to appreciate the full force of the later of those decisions, that we should refer to the first. In it *The Bank of Australasia v. Harris*, read by itself, the judgment did not appear to rest solely on the construction of the enactment; it was based rather on the insufficiency of the plea, a strong opinion being twice expressed that the clause in question, taken in connexion with the context, implied a fraudulent preference. In the second case, *Nunes v. Carter*, the question was whether a transfer made by a person in insolvent circumstances, and within a period of six months before a declaration of insolvency, but without any evidence of fraudulent preference, was void under the Jamaica "*Insolvent Act*," that Act providing that if any person in contemplation of insolvency shall transfer any of his estate to any creditor for the benefit of such creditor, such transfer shall be deemed fraudulent and void against the official assignee, provided that no such transfer shall be so deemed fraudulent and void, unless made within six months before a declaration of insolvency.

The judgment, after referring to this Act, and to a contention that a transfer without proof of circumstances constituting a fraudulent preference would not be avoided, proceeded thus:—"We are of opinion that this is not the true construction of the Act. In support of that construction, we were referred to a case decided by this committee, *The Bank of Australasia v. Harris*, in which, in the construction of the Queensland Insolvent Act, 5 Vic., No. 17, sec. 8" (of which sec. 31 of the present Act is a transcript), "it was held that a transfer of property made within a given time, must be proved to be a fraudulent preference in order to its being avoided." * * * * *

"The conditions of the avoidance of a transfer in that Act were two—one, that it should be made within a certain period of time before the insolvency; the other conjointly, that it should have the effect of giving a preference to one creditor over the others; and it was held in the judicial in-

terpretation of the Act that the preference must be fraudulent." * * * * * "We have no doubt of the correctness of the decision in the Queensland Act, but the Jamaica Act is founded altogether upon that which was the policy of the bankrupt law, and of the insolvent law from the earliest time, until they were altered by recent legislative enactment." We cannot but think that whatever doubt might have arisen as to the intentions of their lordships by the judgment delivered in the first case, there is no room for question now that it is read by the light of that pronounced by them in the second. In drawing a distinction between the two enactments, and answering the arguments addressed to them during the hearing of the latter case, they were almost necessarily compelled to express their opinion as to the proper construction of the one statute as much as of the other. The one declares a transfer, if made within a certain period by a person in contemplation of insolvency, fraudulent as well as void; the other, though verbally silent on the first point, declares a transfer of the same kind, accompanied by the further ingredient of having the effect of preferring one creditor to another, void only. It obliges, however, in effect, the person who impeaches such a transfer, to adduce, in addition to the proof required in the former instances, evidence of facts shewing affirmatively that it was made under circumstances which render the preference fraudulent also; leaving to those interested in upholding its validity the task of rebutting such a case by maintaining that the transfer was made *bona fide* in the way of trade or business, or under pressure; or, to put it briefly, the one Act itself declares the transfer both fraudulent and void; the other declares it void only, leaving the fraud to be shewn by evidence. The contrast drawn between the two clauses would be without force, and the conclusion almost inconsequential, unless we take their lordships to have expressed a decided opinion as to the proper construction to be placed on both. The two judgments read

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together form, in our opinion, a distinct decision on the point, and constitute therefore an authority binding on us. The Act 28 *Vic.*, No. 273, we may observe, follows, as regards assignments in trust for creditors, the Jamaica Act, and by sec. 119 declares that such assignments, if made under the circumstances specified, shall be taken to be fraudulent and void. There is no evidence in either of the cases, to support the proposition that the act of *Westbury*, although it put the Plaintiff *Sheldrick* in a better position than the rest of *Westbury's* creditors, amounted to a fraudulent preference. We accordingly allow both appeals. In the first, we direct a verdict for the Plaintiff for the amount in the Defendants' hands, £136 6s. 4d.; and in the other, a verdict for the Defendants, each with costs in the county court; but as the decisions have been in conformity with the construction recognised for so many years by the Court of New South Wales interpreting the same Act, as well as by this Court, a construction which we think has now been virtually, if not expressly, overruled, we allow no costs of the appeal in either case.

REGINA v. PETHYBRIDGE.

June 21.

The Prothonotary is the proper officer to sign an information in the nature of a *quo warranto*.

MACKAY moved for a rule *nisi* to quash an information in the nature of a writ of *quo warranto*, calling upon *Pethybridge* to shew cause by what authority he exercised the office of a councillor of the borough of Malmsbury. Mr. Justice *Williams* had made an order directing Mr. *J. A. Porter*, the Prothonotary of the Court, to sign the information; and it was contended that the information was bad, as the Prothonotary was not the proper person to sign it. In England, informations of this nature were filed by the Master in the Crown Office, and they were issued

in the name of the Clerk of the Crown. If that functionary did not act properly he could be punished, but there was no power to punish the Prothonotary. The duties of the Prothonotary were clearly distinguishable from those of the Clerk of the Crown. *Tbmlin's Law Dictionary* title Prothonotaries. *Wharton's Law Lexicon*, 1 Tidd., 43, *Bellamy v. Burrow* (z). There were three classes of information—by the Attorney-General, by the Grand Jury, by the Clerk of the Crown; never any by the Prothonotary. In the absence of a Clerk of the Crown, or any corresponding officer, no such informations as the present could be filed, just as in the absence of the Attorney-General or Solicitor-General, other functions could not be performed. The difficulty could have been overcome had the relator obtained a rule to oust from office under the "*Municipal Statute*," No. 184.

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STAWELL, C. J.—The Legislature, in establishing this Court, prescribing its functions, and naming certain officers to carry on business, intended that these officers should be sufficient for all practical purposes to carry out the object. It is to be assumed, we think, that the Prothonotary is the proper officer to sign informations of this kind. The objection would lead to the Court being unable to exercise the jurisdiction conferred on it, without at once appointing additional officers. That, in naming the officers of the Court, the Act *ex abundanti cautela*, went on to say, "such and so many other officers as to the Judge or Judges shall appear to be necessary for the administration of justice, and the due execution of all the powers and authorities of the said Court," does not affect the question. We are not unnecessarily to put on excrescences which have grown up on an old court in an old country, and which it now seems to be the object of the Legislature to remove. We think that the order in this case was right, and must refuse the rule.

(z) Rep., tem., Talbot, 97.

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BARRY, J.—The only question is the name of the proper officer to discharge these duties. I think the Prothonotary is perfectly able to discharge them, and there is no necessity to relieve him from the duty of filing these informations.

Rule refused.

REGINA v. McMEIKAN AND ANOTHER.

June 21, 22.

On rule *nisi*, calling on *McM. & R.*, proprietors of a bone-mill, to shew cause why leave should not be granted to file a criminal information for nuisance against them, *Held*, that the right to proceed by information is not taken away by the special enactments of the "Public Health Statute," with regard to noxious trades; that the same principles which guide the grand juries in

RULE *nisi* calling on *James McMeikan* and *James Reid*, proprietors of a bone-mill, situated at Flemington, to show cause why a criminal information for a nuisance should not be filed against them.

Michie, Q.C., and *Dunne* shewed cause. This is not the case of a nuisance established in a town; it has not gone to the people, but the people have gone to it. It is not in the centre of a town, but in a suburban and thinly peopled neighbourhood. The manufactory is of peculiar usefulness; it must be carried on somewhere, and may be as well at Flemington as elsewhere. The factory is not injurious to health; numerous witnesses examined at the Police Court, including the Local Health Officer, proved that the workmen at the place did not appear to suffer by it in health. Where a factory is not injurious to health the Court will have regard to its usefulness before pronouncing it a nuisance. *Rolles Abr.*, 139, and 1 *Russell on Crimes*, 437-8.

England, should guide the officers here, who are the substitutes for the grand jury; and that the Defendants were liable to information in this case; but that the Court would interfere only in extreme cases; and as in this case the Central Board of Health had issued orders for the abatement of the nuisance, and the Court would presume that the Board would enforce its orders, the rule *nisi* would be discharged upon the Defendants paying costs.

Per BARRY, J.—If, in this colony, a noxious trade is established in a place, and people afterwards come to reside in the neighbourhood, or a road be brought to it, the public are entitled to complain; for judicial notice must be taken that this country is in a state of progressive location, and is only being inhabited by degrees.

Since the rule was obtained, the Secretary of the Local Board of Health has given the Defendants instructions for works which will have the effect of mitigating any smell. This notice is a virtual abandonment of the rule, and the six weeks mentioned in the notice ought to elapse before any further action is taken. Besides, the Court has no power to grant these rules. The "*Public Health Statute*," No. 310, sec. 32, enacts certain provisions in regard to offensive or noxious trades, and these enactments take away the common-law remedy of proceeding by means of an information. In the corresponding English Act 18 and 19 *Vic.*, c. 121, the common-law right is expressly saved, here it is not so. [*Stawell*, C. J.—Our jurisdiction is not to be taken away unless by express enactment; our Legislature have not thought fit to follow the precedent set by the English Parliament, but that is no reason why the jurisdiction of the Court should be taken away.] This Court will not interfere where the prosecution has gone before the magistrates, and where the Attorney-General declines to file an information. The Borough Council have no power to attempt to stop a nuisance outside their boundary. *Mayor of Ballarat East v. Smith (a)*.

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Fellows and *C. A. Smyth* in support of the rule. The notice by the Central Board of Health requiring certain alterations to be made in the Defendants' premises, does not condone the offence for which this rule was obtained. No attempt has yet been made to get rid of the nuisance. It still exists, notwithstanding the repeated attempts made by the Board of Health to have it mitigated. It is said that the "*Public Health Statute*" takes away the common-law right to indict for a nuisance, but the statute is rather enabling than disabling: it enables justices to take cognisance of offences for which, previous to the statute, they had no jurisdiction; but that does not interfere with the common-law right of indictment. The fact that the

(a) *Ante*, Vol. I., Eq., 52.

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Defendants tried to mitigate the nuisance is really no answer to the case at all. It might be brought forward as an argument against a heavy punishment. Nor is the existence of the nuisance since 1853 any defence. No length of time can privilege a nuisance. *Bac. Abr.*, 793; *Russ. on Crimes*, 456. The usefulness of the offensive trade is no answer, for though it is necessary that it should exist somewhere, there is no necessity for it to be in the Queen's Highway. *Russ. on Crimes*, 436. The fact that it existed before people went to the neighborhood is no answer, *Rex v. Neil (b)*. Nor is it necessary that it should be injurious to health before a criminal information can be filed. The notice given by the Local Board, in June last, was transmitted by the Central Board of Health to the Local Board, and the latter were bound, under the Act No. 310, sec. 26, to forward it to the Defendants under a penalty of £50.

STAWELL, C. J.—The affidavits on which this rule was obtained, showed a strong *prima facie* case of the existence of a nuisance; and, according to the rule by which grand juries are guided at home, such evidence, ought to be sufficient to justify the filing of an information. That which would justify the justices in committing, would in most instances, justify a grand jury in filing an information. If a strong case is contradicted, it at once becomes one for a jury. So also any case, which, assuming it to be uncontradicted, would warrant a conviction. The same principles which guide grand juries, should guide the officers who are here the substitutes for a grand jury. In this instance the justices committed the Defendants for trial, but no information was filed, and an application is made to this Court for leave to file a criminal information against the persons thus committed by the magistrates. The Central Board of Health, has, it appears, issued an order to the Defendants to stop this pestiferous and offensive smell; and

(b) 2 C. & P., 485.

that order is being carried out by the Local Board of Health, who are substantially the applicants in the case. The time granted by that order for the execution of certain works has not yet expired. I think that this Court should hesitate to interfere unless absolutely compelled so to do. To grant a criminal information should be regarded as the exception rather than the rule. Arrangements are made by our Constitution for the filing of informations which ought to meet all necessary requirements, and we should not interfere with them unless in extreme cases. I presume that the Central Board of Health will see that its orders are duly carried out. If they are, there will be no necessity to proceed further in this matter. Under these circumstances, I do not think we should now interfere. It has been suggested that we should make this rule absolute, but that it should remain in the office and not issue for a certain time; but that course is obviously open to the objection, that it will allow the applicants, and not this Court, to determine if there has been a fresh nuisance. We think the applicants were justified in coming to the Court, and are entitled to their costs; and the rule will be discharged on the Defendants paying costs. If a nuisance is committed after the time allowed by the Central Board has expired, the applicants can then pursue whatever course they may be advised. I must say that, according to the evidence, very little seems to have been done from the time the rule *nisi* was granted to the present date in mitigating the nuisance. That it existed is clear; but the Defendants have not taken any active steps since the rule *nisi* was granted. I think, therefore, that they may regard themselves as very leniently treated.

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BARRY, J.—I must dissent from the proposition that to constitute a nuisance there must be injury to the public health. Anything that interferes with the enjoyment of the public, or is offensive to the senses, is a nuisance. Keeping a pack of hounds, for instance, in the centre of a

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town, killing pigs at an inconvenient time, when their cries would disturb the neighborhood, the making of noises of an unusual or disagreeable kind, are all punishable as nuisances. I must also dissent from the proposition that if a noxious trade is established in a place, and people afterwards come to reside in the neighbourhood, or a road is brought to it, the public are not entitled to complain. The doctrine might be sound in an old and long-settled community, but judicial notice must be taken that this country is in a state of progressive location; it is only being inhabited by degrees. If a trade were established on vacant waste lands of the Crown, and other land in the neighbourhood was afterwards sold, and people lived on it, I doubt very much whether the rule I have alluded to could be maintained. The Court will be very careful indeed before adopting such an extensive rule, which might have an extremely injurious effect upon the development of the resources of the country.

*Rule discharged upon Defendant
 paying the costs.*

THE MAYOR, &c. OF FITZROY v. THE
 COLLINGWOOD GAS COMPANY.

June 22.

Where a gas
 company has
 its works in
 one borough,
 and its mains
 and pipes
 extend into

other boroughs, the basis on which the property of the company must be rated, is to take the gross receipts, deduct the gross expenses, and so arrive at the profits, the average of which, for a short period of years, will give the net annual value of the whole property, which is to be apportioned over all the boroughs in which the works are situate, or through which the mains and pipes pass.

Appeal cases are, in this colony, allowed from decisions of petty sessions in rate cases.

SPECIAL case by way of appeal from an order of Petty Sessions reducing the assessment of the Gas Company from £5,000 to £1,250.

Billing, for the Respondents, took a preliminary objection. No appeals are allowed from the decisions of petty sessions in rate cases. *Wheeler v. The Churchwardens of Brimington* (c).

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Fellows.—That decision is based upon the words of the English "*Justices' Act*," 20 and 21 *Vic.*, cap. xliii., sec. 2, which only allows appeals in cases of "information or complaint." Our "*Justices' Act*," 28 *Vic.*, 267, sec. 150, allows appeals from the determination by a Justice, of any "matter" which he has power to decide in a summary way. There is a material distinction between the phraseology of the two Acts.

PER CURIAM,

Objection overruled.

It appeared from the case stated that the property of the Company consisted of about four acres of land, situate near the junction of Smith-street with the Heidelberg-road, within the borough of Fitzroy, whereon were erected the works of the Company, consisting of gasometers, retorts, &c., and where the whole of the gas sold by the Company to their customers is manufactured, together with a dwelling-house, and also of the gas mains or pipes laid down in the streets in the said borough, and used by the Appellants for distributing the gas to their customers, as well in the city of Melbourne and its suburbs as in the said borough of Fitzroy. It also appeared from the evidence that the valuer, after viewing the property and premises, and checking his valuation by the balance-sheets of the Company to the year ending 30th June, 1868, disclosing a net profit for that year of £7,689 19s. 1d., estimated the net annual value thereof at £5,000. It also appeared that the valuer, in arriving at this valuation, had considered himself entitled, in estimating the value of the land, buildings, gasometers, retorts, and pipes of the company, to take into considera-

(c) 2 L. T., N. S., 171.

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tion their use and value to the Company as a means of producing their profits. It also appeared that the gas mains and property of the Company, situated in other districts, were valued upon a gross valuation of £3,750. It was contended at the hearing before the Petty Sessions, by counsel, on behalf of the borough council, that inasmuch as all the gas sold was manufactured upon the property within the borough, and passed through the mains situate therein in the course of distribution to all the consumers thereof, the valuer was correct in his mode and principle of valuation of the ratable value of the property, and that the Company were properly rated upon such valuation of £5,000. The justices adjudged and determined that the amount of the valuations of the property of the Company situate in other districts, amounting to £3,760, should be deducted from the amount of £5,000, at which the land, property, works, and mains of the Company, situate in the borough of Fitzroy, had been valued, and that the difference between the two sums should be taken as the proper valuation of the said land, property, works, and mains, and thereupon reduced the valuation from £5,000 to £1,250, in accordance with such determination. The question stated for the opinion of the Court was—Whether the determination in reducing the valuation as aforesaid from £5,000 to £1,250, upon the grounds above stated, was erroneous in point of law?

Billing for the Company. The question is whether the value of this property is distributable over all the boroughs in which the Company have pipes; or whether the borough in which the retorts and gasworks are, should receive the entire rate. The rate is clearly apportionable. *Reg. v. West Middlesex Waterworks Coy. (d), Re the Sheffield Gas Coy. (e), Walker v. the Great Western Railway Coy. (f).*

(d) 1 Ell. & Ell., 716.

(e) 32 L. J. M. C., 169.

(f) 29 L. J. M. C., 107.

Fellows for the Borough. The justices adopted an improper basis for their valuation; I do not dispute that the value of the works is distributable among all the boroughs, but that is not the only basis. The bases are laid down in *Reg. v. the Great Western Railway Company (g)*, namely—they are to take the gross receipts of the company, and make certain legal deductions therefrom, besides the expenses of working; the balance is supposed to be what a tenant would give for the occupation, and that balance is distributed among the different boroughs, according to the quantity of land occupied. [*Stawell*, C. J.—The Fitzroy Council will get less on that basis than they do now.] Perhaps they will, but they are willing to take it. [*Billing*.—The objection now made was not taken below.] It appears on the face of the case.

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STAWELL, C. J.—In this instance the objection taken before us, was not taken before the justices. It appears, however, on the case, and we must deal with it. The simple question, as I read the case before the justices, is whether the value of the works is apportionable to all the boroughs through which the company's pipes pass, or whether the borough of Fitzroy should receive the whole. It is now conceded that the value ought to be apportioned; but it is said that is not the principle on which the assessment should have been based. The principle, we think, is an improper one, and the best course now to pursue is to allow the appeal. It is possible that in reconsidering the case the justices may not arrive at a different amount from that which they have at present adopted; and, if so, their decision need not be disturbed.

We shall remit the case to them with an expression of our opinion that the proper basis on which to estimate the valuation is to take the gross receipts, deduct from them the gross expenditure, and arrive in that way at the profits.

(g) 6 Q. B., 179.

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From the average of these profits over a short period of years, they can arrive at what a tenant would give for the premises. The rent which a tenant would thus be prepared to pay for them is the net annual value of the whole property; and that is to be apportioned over the whole of the boroughs through which the mains or pipes pass. The value in each borough is ascertained by the value of the land on which the pipes rest, having regard to the purpose for which it is granted. According to these principles the council may get a lower amount than that which has been already awarded them.

REGINA v. DALY.

June 23.

Magistrates can only award costs in cases over which they have a summary jurisdiction, not in indictable offences; therefore, where *D.* was charged with perjury, and the case "dismissed with £10 10s. costs," a prohibition was granted restraining the enforcement of the order for payment of costs.

RULE *nisi* for a prohibition to restrain the Justices at Ararat from enforcing an order directing payment of costs. A person had been charged before them with perjury, but the case was dismissed with £10 10s. costs.

Mackay for the rule. By the "*Justices' Statute*," No. 267, secs. 97 and 115, the Magistrates can only award costs in cases over which they have a summary jurisdiction, not in indictable offences. The accused party could recover his costs in an action for malicious prosecution, in which the prosecutor would have an opportunity of shewing that he had acted with reasonable and probable cause.

No appearance against the rule.

PER CURIAM.—The rule must be made absolute.

WALSH AND ANOTHER v. JOHNSTON.

1869.

June 23.

APPEAL from Petty Sessions at Ballarat. Plaintiffs sued Defendant for £14 5s., balance of an account for work and labour done, under the following agreement:—

“Memorandum of agreement entered into December 8, 1868, between *Edward Walsh* and party and *Francis Johnston*. *Edward Walsh* and party do bind themselves to erect framework for four puddling machines, six horses for carrying span beams, one gear horse, with stay; six span beams and runners for tramways, bolted and screwed as denoted; all horses and span beams and runners to the satisfaction of the company's engineer—for the sum of £47 10s., to be completed in three months from date, on the No. 2 shaft of Winter's Gold Mining Company, and £2 more for extra legs, in all £50.”

W. and another, contracted in writing with a mining company to put up machinery “to the satisfaction of the company's engineer.” The work was done, and payments were made on account. *W.* and another sued for the balance. The engineer of the company proved that he was dissatisfied with the work, but the magistrates gave judgment for the Plaintiffs. On appeal decision reversed.

Plaintiffs proved they executed the work under the agreement, and received payments on account; but it was admitted that the company's engineer was not satisfied with the work, and in his evidence before the justices he mentioned several objections to the manner in which it was performed. The magistrates gave judgment for Plaintiffs for £12 5s.

Fellows for the Appellant.—The approval of the engineer was a necessary condition to enable the Plaintiffs to recover. *Parkes v. the Great Western Railway Company* (h).

No appearance for the Respondents.

PER CURIAM.—The decision of the justices is erroneous. Complainants were to execute the work to the satisfaction of the company's engineer, and they did not do so.

Appeal allowed.

(h) 3 Rail & Canal Cases, 17.

1869.

June 24.

W. sued, as administrator of his son, for damages for the death of his son. At the trial it appeared that the letters of administration were dated subsequently to the writ in the action, and *W.* was nonsuited. The year for suing having expired, on application for a rule *nisi* to amend the existing record by inserting as the date of the writ, a day subsequent to the date of the issue of the letters of administration,

Held, that the Court had no power so to alter the record, as to make it bear a false statement, and rule *nisi* refused.

WILKS v. THE AUSTRALIAN TRUST COMPANY.

PLAINTIFF sued, as administrator of his son, to recover damages for the death of his son, being occasioned by the fall of a wall belonging to Defendants. Defendants pleaded *inter alia* that Plaintiff was not administrator. It appeared at the trial before *Barry, J.*, at the sittings before Trinity Term, 1869, that the letters of administration were granted subsequently to the date of the writ. The Judge therefore nonsuited the Plaintiff.

Mackay moved for a rule *nisi* to set aside the nonsuit and amend the declaration, by inserting as the date of the writ a day subsequent to the grant of the letters of administration. More than a year had elapsed from the lad's death, and therefore a fresh writ could not be issued. The Court had power to amend the record, so as to prevent injustice being done to suitors. *La Banca Nazionale v. Hamburger (j)*, *Blake v. Done (k)*, *Brennan v. Howard (l)*, *Martin v. Williams (m)*, *Emery v. Webster (n)*, *Siggero v. Samson (o)*, *St. Losky v. Green (p)*.

THE CHIEF JUSTICE.—The Court has power to alter the record, so as to make it consistent with the facts; but it has no power so to alter it, as to make it bear a false statement. Were we to amend this declaration by inserting the date of the writ as subsequent to the letters of administration, we should be making the record state as a fact that which is untrue.

Rule refused.

(j) 2 H. & C., 330.

(k) 7 H. & N., 465.

(l) 1 *Ib.*, 138.

(m) 1 H. & N., 817, S. C.; 26 L.J., N.S., Ex., 117.

(n) 9 Ex., 242.

(o) 2 Dowl. P. C., 745, and 10 Ex., 901.

(p) 30 L.J., N.S., C.P., 19.

REEFS GOLD MINING COMPANY v. BENNETT.

APPEAL from Petty Sessions at Stawell.

Defendant was sued for £7 10s., calls due on thirty shares held by him, and an order was made against him, from which he appealed.

The case was stated as follows:—

"It being admitted that the company was duly registered, it was proved that the calls in question were authorised by a meeting of the company held on 5th January, 1869, and *Nicholas Duffield*, their manager, was examined, and produced the book containing register of shareholders kept by the company, and also their minute book, and read therefrom the 12th rule, ordering that 'all transfers of shares in the company from or by any shareholder shall be made in writing.' He also proved that Defendant had, from time to time, become the holder of thirty shares purchased on several occasions from different parties, and that, according as he purchased, the manager entered or transferred them into Defendant's name in the register, and that Defendant had admitted to him that he (Defendant) held thirty shares while the property was good. He also proved that Defendant never had his shares transferred to any other person in the books of the company. Upon the manager's examination it was shewn with reference to fifteen of the shares that a written authority was given by the original vendor to the manager; that five shares were transferred, or entered, upon the verbal authority of the transferror; and with reference to ten shares, although no written authority to transfer at the time of sale was given to the manager, it was subsequently given him by the vendor. The Defendant was examined, and admitted that at one time he was the holder of thirty shares in the company, but denied being a shareholder, or liable for the calls; that he had parted with twenty-five of the shares previous to action, and stated that he never authorised his name to be entered in the register of shareholders produced, and that he had never accepted, in writing,

B. admitted in evidence that at one time he held thirty shares, but said that he had never accepted in writing any of the shares. None of the shares had been transferred from *B.* in the books, and he had attended a meeting as holder of five shares, of which no written transfer had been made. The magistrates gave judgment against *B.* On appeal,

Held, that there was evidence to go to the magistrates of a liability which *B.* had not disproved.

1869.

June 25.

B. was sued in petty sessions for calls on thirty shares in a mining company. The 12th rule of the company required that "all transfers of shares in the company, from or by any shareholder shall be made in writing." *B.* from time to time purchased and held thirty shares. As he purchased, the manager transferred them into his name in the register. As to fifteen of these, the transfer in the register was made on the written authority of the vendor; as to five, on his verbal authority; and as to the other ten, the transfer was ratified by writing by the vendor after it was made.

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" of any of the transfers alleged to be made. That he had sold, but
 " might be liable for five shares. No evidence was given that the
 " Defendant had ever accepted in writing the transfers of any of the
 " thirty shares; but it was proved and admitted that on the 10th of
 " August, 1867, he attended a meeting of shareholders as the then
 " holder of five of the shares before referred to, and of which no written
 " transfer by the former owner had been made. Defendant admitted
 " to *Nicholas Duffield*, the manager of the company, that he (De-
 " fendant) was a shareholder in the year 1867. At the close of the
 " complainants' case, counsel for Defendant submitted that the com-
 " plaint should be dismissed, on the grounds following:—1. That upon
 " the evidence adduced the Defendant could not be constituted a
 " shareholder, or held as such. 2. That there was no instrument pro-
 " duced signed by both transferor and transferee, purporting to transfer
 " the shares held by Defendant, and no evidence being given that same
 " had ever been done, the Defendant was not liable. 3. That it not
 " appearing the Defendant had ever testified in writing under his hand
 " his acceptance of the transfers of the shares, nor that he had ever
 " authorised his name to be entered in the book of shareholders, the
 " Defendant could not be held liable for calls, although his name was
 " inserted as a shareholder on the register of shareholders produced.
 " The Justices overruled these objections, and Defendant appealed."

Wrixon for the Appellant.—There is no proof that the Defendant is possessed of any shares. The fact that he once held shares does not prove that he held them at the time he was sued. The register of shareholders is no evidence against him, as he never gave the manager authority to insert his name upon it; nor were the shares sued upon identified as those for which he was registered. *Mariott's Case* (q), *Pilley v. Hart* (r).

Fellows for the Respondent.—No doubt it must be shown that the Defendant possessed shares; but the Court will not presume that the register is untrue. It will presume that the shares sued for were those for which he was registered. It is not necessary the transfer to him should be in writing. Such a formality is not required by the statute. There is also his own admission that he possessed shares. *Sheffield Railway Company v. Woodcock* (s),

(q) L. R. 2 Ch. Cases, 596.

(r) Sup. Ct., Vic., Nov. 28, 1867.

(s) 7 M. & W., 574.

Okeltenham Railway Company v. Daniel (t), *London Grand Junction Railway Company v. Graham* (v), *Hull Flax Company v. Wellesly* (w), *Irish Peat Company v. Phillips* (x).

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STAWELL, C. J. :—The Defendant admits he was a holder of shares, but not a shareholder—a very thin distinction. The shares were transferred to him, and they appear in his name in the register. It does not appear that he ever transferred the shares to any one else; and the Court will not presume that he did so, without some proof of some kind. We think there was evidence to go to the magistrates of his liability, which he has not disproved.

Appeal dismissed.

(t) 2 Q. B., 281.
(v) 1 Ib., 271.

(w) 6 H. & N., 88.
(x) 80 L.J., N.S., Q.B., 363.

IN THE MATTER OF THE "TRANSFER OF LAND
STATUTE," AND IN THE MATTER OF THOMAS
H. POWER.

SUMMONS referred to the Court by *Williams, J.*, by which an order was applied for, restraining the Registrar of Titles, under the "*Transfer of Land Statute*," No. 301, from registering *Power* as the owner of land in Smith-street, Collingwood.

Power bought the land in 1842, had conveyed part of it, but never executed a conveyance of the part which he now applied to have brought under the Act. A caveat was lodged against his application by *Thomas Smith*, who set up a claim to the land by adverse possession for more than fifteen years.

June 23, 25.

A Judge in Chambers has no jurisdiction upon summons to make an order under the Act No. 301, sec. 24, restraining the registrar from bringing land under the Act. To obtain such an order the Caveator must either bring an action, or file a bill.

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Webb for the Caveator. Under sec. 24 of the "*Transfer of Land Statute*," the Caveator is entitled to an order of a Judge restraining the Registrar from bringing this land under the Act. *Smith* having been in possession for more than fifteen years, has now under the "*Real Property Act*," sec. 43, a good legal title, and not merely a possessory right; and by that section the right and title of *Power* is absolutely extinguished. Under the present law, as distinguished from the old Statutes of Limitation, which only barred the remedy, adverse possession for more than fifteen years confers an absolute title—*Doe d. Carter v. Barnard* (y)—and one which a Court of Equity will force upon a purchaser. *Scott v. Nixon* (z). *Smith* is therefore entitled to come in and oppose *Power's* application. It is true the certificate to *Power*, if issued, will be subject to claims by adverse possession; but if the certificate of title be once issued it will give to him a title which he does not now possess, and deprive *Smith* of the title which he has now acquired. He could never sell the land and the utmost he could do would be to prevent being ejected.

T. A'Beckett for *Power*. An order obtained on summons from a Judge in chambers is not the order contemplated by the Act. Sections 23, 25, 26, and 117 recognise the distinction between proceedings before a Judge and proceedings in chambers. Section 24 omits any provision as to a summons in chambers, clearly shewing the intention to exclude that jurisdiction in a proceeding by a caveator against an applicant. The section is to be read as providing for a proceeding in a court of competent jurisdiction to establish title, and notice of that proceeding to be given to the registrar; or an injunction or order obtained on that proceeding, not on summons. Otherwise an applicant would, by proceedings in chambers, be permanently excluded from the benefit of the Act, without the possibility of an appeal, which he would have if it were by an injunction.

(y) 13 Q.B., 945.

(z) 3 D. & War., 388.

Webb in reply. A claimant by adverse possession can take no active proceedings to establish his title. He is in possession, and therefore he cannot bring an action of ejectment; he has no equity against the applicant, and therefore he cannot file a bill in equity. He is thus helpless, and though he has a good statutory title—which before the grant of the certificate of title he can convey or otherwise deal with—yet, so soon as this certificate is issued, he can do nothing, and is deprived of his property. Section 24 is divisible into two parts, each intended to meet cases falling within it. Under the first, where a person can establish his title, he must do so either by suit for specific performance or by ejectment; under the latter part, where a person is in such a position that he can take no steps to establish his title, he may obtain a judge's order.

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STAWELL, C. J.—I am against the application on every point. But in this preliminary one, against the jurisdiction of the Judge, I entertain no doubt whatever, for I have had occasion to consider it more than once. I think the only way to read section 24 is that the caveator must bring an action of ejectment, or file a bill in equity. I do not think that by "order of a Judge," the Legislature meant a Judge in chambers; for where they did mean that, they have said so plainly.

Summons dismissed.

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June 26.

A Warden has no jurisdiction, before the hearing of a case, to direct substitution of service of the summons

REGINA v. AKEHURST.

MACKAY moved for a rule for a writ of *certiorari* to bring up certain proceedings before Warden *Akehurst*, at Alexandra, to quash them. A summons was issued against a person named *Lagoni* to appear before the Warden in some mining dispute. At the time the summons was issued the Warden made an order substituting service of it upon the Defendant by directing advertisements in the local papers. It was contended now that the Warden had no jurisdiction to direct substitution of service of the summons at the time it was issued, but could only make such order at the hearing. *Taylor v. Stubbs (a)*.

The Court granted the rule absolute in the first instance.

(a) *Infra*, Mining, 19.

REGINA v. BARTROP.

June 28.

Mandamus granted to compel a clerk of a Court of Mines, to issue a certificate of registration of a company, which had been registered by his predecessor.

FELLOWS applied for a rule *nisi* for a *mandamus* to compel *G. F. Bartrop*, the clerk of the Court of Mines at Ballarat, to issue a certificate of the registration of the North-Western Freehold Gold Mining Company. The clerk considered that, as the registration was effected with a previous officer, and not with him, he could not give a certificate. *Regina v. Green (b)*, was referred to.

The Court granted the rule.

(b) Sup. Ct., Vic., Hilary Term, 1868.

REEVES v. BROWN.

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SPECIAL case stated by way of appeal by the Police Magistrate at Ballarat.

Defendant was summoned by the official agent for contribution on ten shares at £1 each in the New Lady Don Gold Mining Company. The case was stated thus:—

"Complainant proved that the company was registered on the 30th day of December, 1867, and was wound up by order of the Judge of the Court of Mines for the mining district of Ballarat, at Ballarat, made on the 23rd day of March, 1869; and *John Gamble*, having been called as a witness for Complainant, stated that *T. W. Campbell* was the manager of the company; that witness had been in *Campbell's* employment as clerk, had kept the accounts of the shareholders with said company, and produced the share registry of the company, only portions of which were in witness's handwriting; the name *William Brown* was entered at the head of the column, but not by witness. (Objection was taken as to the admissibility of this evidence, but I allowed the evidence to go in, for what it was worth.) Defendant *Brown* was entered for ten shares, and, according to the book and the entries in witness's handwriting, had paid all calls up to the eleventh. The ninth call of 5s. per share was made on the 28th December, 1868; the tenth call of 5s. per share was made on 2nd February, 1869; the eleventh call (designated a machinery call) of 5s. per share was made on the same day; the twelfth call was made on the 10th March, 1869. A receipt had been given by *John M. Garrett*, acting for the manager. There was a large amount of the ninth call not paid at the time the tenth, eleventh, and twelfth calls were respectively made. It was proved that at the time the eleventh call (machinery call) was made the works of the company had been stopped. It was further proved that after making and payment of the twelfth call there would be still unpaid capital equivalent to 5s. per share to be called up. The deed of association of the company, signed by the Defendant, and dated January 16, 1868, was put in; and it was thereupon, on the part of the said complainant, contended that the directors had no power to make the tenth, eleventh, or twelfth calls, as the ninth call had not been paid; and further, that if properly made, the directors could not take promissory notes in payment; and that if they could, the promissory note given by Defendant was not lodged with the bankers of the company, as required by the 23rd clause of said deed. It was contended on the part of the Defendant that the ninth, tenth, and eleventh calls had been duly made, and were paid to the com-

B., official agent of a mining company, sued *B.* in petty sessions for contribution on ten shares. It was proved that the ninth call was not paid up when the tenth and eleventh calls, which had been paid by *B.*, and the twelfth call were made. The Plaintiff contended that for this and other reasons, these calls were wrongly made; that Defendant paid the tenth and eleventh calls in his own wrong, and could not have credit for them. The police magistrates so held. On appeal, *Held*, that the company having received the calls from *B.*, was not entitled to compel payment of them a second time; and that the official agent was similarly disentitled.

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"pany; and the official agent was in the same position as the company, and could not deny the legality of the making of the calls, nor the payment of them, nor the mode of payment, the act of the manager having been confirmed, and the promissory note transferred to third persons. I being of opinion that the tenth and eleventh calls were not properly made, also that they ought not to be considered as paid by the acceptance of a promissory note by the directors; also being of opinion that the twelfth call was improperly made, and if paid on 23rd March, 1869, could only have been paid to the official agent; and also being of opinion that, in addition to these calls, there was still unpaid capital amounting to 5s. per share, held that the Defendant was liable, and ordered him to pay £10 for uncalled capital, with £1 5s. costs. The question for the opinion of the Court is whether the said determination was correct in point of law, and what should be done on the premises?"

Higinbotham, for the Respondent, did not rely on the fact that the Defendant gave promissory notes instead of cash, in payment of the calls, nor on the bills not being paid into the Bank, but on the point that the last call was informal, and could not be made while the previous calls were unpaid. If a shareholder paid it, therefore he paid it in his own wrong, and could not be allowed credit for it.

Fellows for the Appellant.—A shareholder must presume that when directors make a call they do what is right; he cannot know whether the previous calls had been paid. If the Company could not sue for five calls, the official liquidator cannot, for he is in no better condition than the Company. *Re Daniel* (c), *Re Nickoll* (d).

THE CHIEF JUSTICE.—In these cases the directors represent the company, and the official agent stands in no better position than the company. The directors acting on behalf of the company made these calls. The company received them, and is not entitled to compel them to be paid a second time. The official agent is similarly disentitled.

Appeal allowed without costs. The judgment of Justices to be reduced by £5, the amount of the calls paid.

(c) 23 Beav., 568; Affd. 1 DeG. & J., 372. (d) 24 Beav., 639.

REEVES v. GREENE.

SPECIAL case from Ballarat.

The Defendant was sued by the official agent of the North-Western Freehold Gold Mining Company for £123 15s., for contribution in respect to ninety-nine shares. The case stated that at the hearing of the complaint Mr. *Greene*, sen., the clerk of the Court of Mines at Ballarat, stated in evidence that the memorial for registration of the company lodged with him was dated the 5th of December, 1867, and witnessed by *S. H. Sheator*, and the memorial for registration, as it appeared in the *Gazette* and local newspaper lodged, was dated the 13th day of December, 1867, and witnessed by *James McAlpine*. The Defendant's attorney then objected, that it had not been proved that the company was registered under the provisions of the "*Mining Companies' Limited Liability Act 1864*;" and that it appeared that the memorial published in the *Gazette* and newspaper had never been lodged with the clerk of the Court of Mines. The Plaintiff's attorney contended that the Defendant could not object to the registration of the company, as he had, by executing the deed of association of the company under seal, which was given in evidence, admitted the registration, and was, in fact, estopped from setting up the fact of the company not being duly registered; and that even if he could, the mere fact of an error occurring in the registration, and the copy lodged being witnessed by another party than the witnesses to the memorial published, did not, as against the official agent and the Defendant, invalidate the registration. The justices being of opinion that the objections raised upon behalf of the Defendant were valid, dismissed the complaint, with costs. The question for the opinion of the Court was, "whether the said determination was correct in point of law."

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G. was sued by the official agent of a mining company for contribution. The evidence of the registration of the company was defective, but the deed of association of the company, executed by *G.*, and which recited the registration and incorporation of the company, was put in evidence.

Held, that the recitals in the deed were only *prima facie* evidence of the registration; and if it were proved *aliunde* that the registration was defective, the magistrates could adopt such evidence.

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Fellows for the Appellant. The Defendant having signed the deed of association, in which it is recited that all the requirements necessary for the incorporation of the company had been fulfilled, cannot be heard now to dispute that statement. *Hull Flax Company v. Wellesley (e)*.

Billing for the Respondent. The recitals of the deed of association are not binding, for it was proved that the recitals were untrue, and that the company was never properly registered, there being a variance between the list of shareholders published and the list deposited in the Court of Mines. *South-Eastern Railway Co. v. Warton (f)*.

Fellows in reply. I do not put the case as high as an estoppel on the Defendant, but as a matter of conflicting evidence, and it was for the magistrates to say which they believed. The Court should send the case back for them to say whether they had decided as a matter of fact, or as a matter of law.

STAWELL, C. J.—We were at first under the impression that the Defendant was estopped by his own admission; but we now think that the recitals in the deed were only *prima facie* evidence of the registration. If it were proved *aliunde* that the registration was defective, the magistrates could adopt such evidence. It were for them to decide on which evidence they thought it safe to rely—that for the objection or that against it.

Appeal dismissed.

(e) 6 H. & N., 38.

(f) 31 L. J., Ex., 515.

HORWOOD v. STACPOOLE.

1869.

June 21, 29.

ACTION to recover the value of two Cleveland horses shipped on board the *Swiftsure*, of which Defendant was master, from London to Melbourne, and which died on the passage owing to neglect on the part of the ship's officers. The price paid for the horses in England was £90 each; and the freight, paid in London, was £65 each. *Barry, J.*, before whom the case was tried, directed the jury that the Plaintiff was entitled to recover the value of the horses at the port of debarkation, and not at the port of shipment. The jury found that the value of the horses in this country was £500, and gave a verdict for that amount, stating, in reply to a question, that they had taken the freight into consideration, in estimating the amount of damages.

In assessing the damages for loss of two horses shipped from England, and which died on the passage owing to the neglect of the ship's officers,

Held, that the jury must consider the value at the port of shipment, the profit, and the freight previously paid. The amount which the Plaintiff would have to pay for similar horses in Melbourne, ought to be the measure of his loss.

Fellows moved for a rule *nisi* for a new trial on the ground of misdirection, or to reduce the damages by £130, the amount of the freight. [*Stawell C. J.* Is not the measure of damages the loss to the person for whom the goods are to be safely carried? Ought he not to be put in funds to enable him to purchase similar horses here?] That would make the carrier insure the profits, which he had not contracted to do.

STAWELL, C. J.—The Defendant, as a carrier, ought to have delivered the horses in Melbourne. He did not do so. The amount the Plaintiff would have to pay for horses of the same description in Melbourne, ought to be the measure of his loss

Rule *nisi* granted to reduce damages only.

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Higinbotham and *Wrixon* now shewed cause. The damages were not excessive. Several witnesses proved that the price of the horses in Melbourne would be £600. The jury did not give the Plaintiff the freight as well as the value of the horses; but they were justified in taking as an estimate of his damage, the price he paid in England, the freight, and the profit he would have made. *British Columbia Saw Mill Company v. Nettleshaw* (g), *O'Hanlon v. Great Western Railway Company* (h), *Rice v. Basendale* (j).

Fellows in support of the rule. There is a difference between the case of a carrier such as a Railway Company and a ship. The carrier need not take the goods till his freight is paid; he may insist on payment beforehand; while a ship-master cannot compel payment of his freight till the end of a voyage. If a shipper therefore pay freight before the commencement of the voyage, he does so at his own risk, and cannot recover it. His payment prevents the ship-owner insuring the freight, which otherwise he could do.

STAWELL, C. J.—It is a mistake to suppose that the Plaintiff recovers the freight *quâ* freight. In order to ascertain the Plaintiff's loss by the non-delivery of the articles shipped, the jury must consider the value at the port of shipment, the profit, and the freight. As the Plaintiff could not get similar horses here, the next best position to place him in, is to enable him to go to England and get others.

Rule discharged.

(g) L. R., 3, C. P., 499.

(h) 6 B. & S., 684,

(j) 7 H. & N., 96

WAUGH v. PALMER.

1869.

June 30.

TRESPASS for malicious prosecution. Plea "Not guilty."

The Plaintiff was coachman to the Defendant at Hawthorn, and lived in a house on the Defendant's property. He was paid wages, and was allowed £4 per annum for wood, he being distinctly told that he was to take no wood for his own use from the Defendant's heap. On the morning of the 11th August, the Plaintiff took three pieces of wood from the Defendant's stack. He carried them some distance, and then threw them into the coach-house paddock. About two hours afterwards he returned to remove the wood, when a constable in plain clothes stopped him, took him before the Defendant and said that he had seen him take the wood from the stack, carry it in the direction of his own house—not the coach-house—and throw it over the fence into the paddock in which his own house was situated. To this charge Plaintiff at the time made no reply—the excuse he gave afterwards being that he was too much ashamed at the accusation, and could not collect his thoughts. The Defendant told the constable to take out a summons against the Plaintiff for stealing wood. Later in the day the Plaintiff returned to the Defendant and offered to shew him that he wanted the wood to fill up a rut near the coach-house. The Defendant however said it was too late, the matter was in the hands of the police.

P. having missed wood from a stack on his premises, employed a detective to watch. The detective took *W.*, the coachman of *P.*, to *P.*, and told him he had seen *W.* take wood from the stack, throw it over the fence, and kick it in the direction of *W.*'s house. *P.* told the detective to take out a summons. Later in the day *W.* stated to *P.* that the wood had been taken for use in *P.*'s own coach-house. *P.* said it was too late for him to interfere. The magistrates dismissed the case. Pending the case before the magistrates, *P.* retained *W.* as coachman, and

he frequently drove out *P.*'s family. After the dismissal of the case, *P.* congratulated *W.* on his acquittal. *W.* sued *P.* for malicious prosecution, and obtained a verdict for £30. On rule nisi for a nonsuit,

Held, that the Court had only to consider the facts within, or brought to, the Defendant's knowledge, when he directed the summons to be taken out; that according to what the detective then stated to *P.*, there was evidence of felony to go to a criminal jury; that the subsequent acts of the Defendant afforded no evidence that he did not believe the detective's statement at the time it was made; and rule for nonsuit made absolute.

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The Plaintiff was retained in the Defendant's employment, and in the interval between the taking out of the summons and the hearing at the Police Court, had frequently driven out the Defendant's family. The magistrates dismissed the case, and the Plaintiff then left Defendant's employ, the latter on paying him his wages observing that he was glad that the case had terminated as it did. The jury gave a verdict for Plaintiff for £30; but a rule *nisi* was granted to enter a nonsuit, on the ground that the Plaintiff had not proved that the Defendant acted without reasonable and probable cause.

Billing and *Molesworth* shewed cause. There was a conflict of evidence, and the matter should be left to the jury. Cases of malicious prosecution were mixed questions of law and fact; and the jury had to say in this instance whether they thought the Defendant really believed the story told him by the constable; for if he did not believe it, he clearly acted maliciously. His refusal to accompany the Plaintiff to the coach-house, to see the purpose for which the wood was wanted, his retaining the man in his service, and his congratulating him on his acquittal, are all evidence to go to the jury that the Defendant did not believe the Plaintiff could have taken the wood. If there was any evidence to go to the jury that the Defendant acted without reasonable and probable cause, Plaintiff cannot be nonsuited.—*Turner v. Ambler* (k), *Hinton v. Heather* (l), *Nicholson v. Coghill* (m), *Willans v. Taylor* (n), *Venafrá v. Johnson* (o), *Huntley v. Simson* (p), *McDonald v. Rooke* (q), *Peryman v. Lyster* (r), *Haddrick v. Heslop* (s), *Douglas v. Corbett* (t), *Chatfield v. Comeford* (v).

(k) 10 Q. B., 252.
(l) 14 M. & W., 131.
(m) 4 B. & C., 23.
(n) 6 Bing., 187; 3 M. & P., 350, and 2 B. & Ad., 845.
(o) 10 Bing., 301.

(p) 2 H. & N., 600, and 27 L. J., Ex., 134.
(q) 2 Bing., N. C., 217.
(r) L. R., 3 Ex., 197.
(s) 12 Q. B., 267.
(t) 6 El. & Bl., 514.
(v) 4 F. & F., 1008.

Fellows and *Dobson* in support of the rule. The Defendant's belief had nothing to do with the proof of want of reasonable and probable cause. The absence of such cause must be proved by independent facts before any question could arise whether Defendant believed the constable's evidence. The argument for the Plaintiff would amount to this, that a guilty man might bring an action like the present—for the charge preferred against him might be true and yet be instituted from the most malicious motives, and without the prosecutor having any belief in it. Yet it was well established that only an innocent man could maintain an action for malicious prosecution. If the charge were true, the fact that the prosecutor did not believe in it when he took proceedings, would not enable the accused to bring an action. A case can only be sent to the jury when there is a conflict of evidence as to the existence of malice; but in this case the evidence was uncontradicted that a felony had been committed at the time the prosecution was instituted; or at least the evidence justified the Defendant in believing a felony had been committed.—*Davis v. Hardy* (w), *Cohen v. Magar* (x), *Rider v. Wombwell* (y), *Cornman v. Eastern Counties Railway Company* (z).

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STAWELL, C. J.—The facts of this case within, or brought to, the Defendant's knowledge when he directed the policeman to take out a summons against the Plaintiff, and those only, are to be considered. The Plaintiff had been in the Defendant's employment some months as coachman. It was his duty to take wood daily from a certain stack. A few days before this occurrence the Defendant had missed wood; he had observed some put in a singular place, in close proximity to the stack, and next day noticed that it had been removed. This was repeated day after day, but the Defendant abstained from instituting a search among

(w) 6 B. & C., 225.

(x) 6 D. & R., 8.

(y) 3 L. J., Ex., 47.

(z) 4 H. & N., 785; S. C.,
29 L. J., Ex., 94.

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the Plaintiff's goods, and put the matter in the hands of the police. A constable was sent to watch. He did watch, and saw the Plaintiff take some billets of wood from the stack, carry them round to a wicket gate, go to a fence completely away from the stables, which were in front of this gate, throw the wood over this fence, and, resting his hand upon the top rail, look right and left, and then kick some of the wood further away from the fence, and in the direction of his own house. On seeing that, the policeman went up to him and told him he must come to the Defendant. The Plaintiff at first refused, but ultimately accompanied him; and the constable in his presence detailed to the Defendant what he had seen. Whether those facts were true is comparatively unimportant. What the constable told to the Defendant, and what the Defendant, reasonably believing, did upon that statement, and not what actually occurred, are the questions on which this case must rest. The constable's credibility was not impeached in any way; and the contradictions of his evidence by the Plaintiff are immaterial. The constable wished the Defendant to give the Plaintiff into custody at once; but the Defendant said "No, take out a summons." The parties then separated; but after the lapse of half an hour the Plaintiff returned to Defendant and said "Come with me to the yard, and I'll shew you that I wanted this wood for a lawful purpose." The Defendant declined, stating that the matter was then in the hands of the police. On the application for a nonsuit, I thought there was scarcely any dispute about these facts; and according to the constable's statement, there was evidence of felony to go to a criminal jury against the Plaintiff. But it was said there were certain expressions used by Defendant—certain statements made by him, which shewed that he did not rely upon this evidence.

I am unwilling to nonsuit on a question of fact; it is different on a question of law or of pleading. I therefore let the case go to the jury, but reserved leave. The only

point which was put to the jury on the summing up for Plaintiff—the only issue which was left to them—was whether the Defendant really believed the statement of the constable and acted on it. It is said that there are two grounds for coming to the conclusion that he did not believe it. One that he retained the Plaintiff in his service. Now that is, strictly speaking, not correct; he gave him notice to leave, and no person is called upon to inconvenience himself and dismiss a servant at a moment's notice, running the risk of being left without one, merely because he has a conviction that he is guilty of felony, the more especially as the servant was not living with the household, but outside. The other was because he congratulated the Plaintiff on his acquittal by the magistrates; but that does not amount to more than unwise good-nature on his part. In one sense it was creditable to him, but perhaps it would have been better if he had said nothing about it. I think there is no evidence to sustain the verdict. Even if the question of belief were in issue (which I do not believe it was or could be), the Defendant's statement is uncontradicted. There is nothing opposed to his statement that he believed the constable. He received certain information, and he believed it. His subsequent conduct, unless inconsistent with that belief, is no evidence to contradict him. Where the evidence is not clear—where there is not reasonable evidence to go to the jury—there ought to be a nonsuit. But there is no doubt in this case. In summing up, I had great difficulty in leaving anything to the jury; and the only point, I could and did leave, was whether the Defendant believed the constable. On that there is no evidence to support the finding of the jury, and I think the Plaintiff ought to be nonsuited.

BARRY, J.—Some difficulty arises occasionally by the want of clearness in explaining the expression “mixed question of law and fact.” It is sometimes erroneously supposed to mean that it is left to the jury to find the law

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as well as the facts. Nothing can be more mistaken. Where there are no facts in dispute, and there are no doubtful or contested inferences from facts, "reasonable and probable" cause is a pure question of law, to be decided by the judge, whose duty it is to decide whether the facts so proved amount to, or do not amount to, reasonable and probable cause. In the former case he sends the case to the jury, with instructions as to the additional ingredient of malice; in the latter he nonsuits. Again, where there is any question as to the *bona fides* of the Defendant's belief in the facts on which he acted, or, where admitting that he did honestly believe that there was sufficient cause for his act, it is a question whether the facts were such as would have justified any other reasonable person in acting as he did, the case goes to the jury; and the judge applies the law according to the conclusion at which they may arrive with additional instructions with respect to malice. There is often, also, the further irregular mixing up of the question of reasonable and probable cause with the question of malice. In this case these two things must be kept wholly distinct. Malice may be inferred from the absence of reasonable and probable cause, but where such cause exists an inquiry into the question of malice is altogether immaterial. Testing the facts in this case by these principles, is there any evidence to shew that the Defendant did not believe the statement made by the policeman in the Plaintiff's presence? What is there in the evidence to shew that the Defendant did not honestly believe the policeman, who detailed facts which shewed the Plaintiff *prima facie* guilty of a felony? Unless there was a doubt upon this point, the jury ought not to have been troubled with the question. The only ground suggested why the jury should not have drawn such a conclusion is, that the conduct of the Defendant *ex post facto* is inconsistent with the conclusion. Nothing occurred at the time, to shew that he did not believe in what he saw and heard. It is said the Plaintiff was allowed to remain in the Defendant's service,

but it is not to be omitted that he did so having received notice to leave at the end of a week; and the Defendant may not have discharged the Plaintiff instantly from a desire not to prejudice his case before the magistrates. With regard to his having a suspected felon in the house, to the degradation of the other servants, it appears that the Plaintiff lived in a separate house. As to the expressions of congratulation on the Plaintiff's acquittal, they may have proceeded from a totally different motive than that attributed to the Defendant. But neither the act of retaining the Plaintiff in his service, nor the expression on his acquittal, can legitimately be held to indicate a state of belief in the Defendant's mind at the time of the detection of the Plaintiff, different from that which ostensibly then influenced his acts.

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WILLIAMS, J.—I think there ought to be a nonsuit. The evidence for the Plaintiff failed to establish that the prosecution was without reasonable and probable cause. The jury are, no doubt, masters of the fact, but if they draw a wrong inference, the Court will set the verdict aside: for we cannot permit them to draw inferences from facts, which they are not at liberty to do. The Defendant is told by a policeman, in the Plaintiff's presence, that the Plaintiff was seen taking away wood in the direction of his own cottage, and evidently for his own use; and the policeman advises him to give the Plaintiff in charge. The Defendant says "No, take out a summons." Surely there is no malice there. The Defendant acts upon good grounds; his wood has been disappearing for a long time, and he sends for the police, and the policeman gives him certain information as to the acts of the Plaintiff. If at that time he has reasonable grounds for believing that the information given him was true, what occurs afterwards cannot alter his belief then. Therefore, although it may have been imprudent to retain in his service afterwards—I do not say it was imprudent—a man guilty of felony, I do not think it

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affects his previous belief. As to his remarks of congratulation, he may have had his own views of the man's conduct, but still be glad he got out of the charge. I do not think that can affect what occurred previously. I think the Plaintiff's case has failed, and that he ought to be nonsuited.

Rule absolute for nonsuit.

HOUSE AND OTHERS v. O'FARRELL.

June 30.

In an action of trespass for breaking and entering the leasehold close of the Plaintiffs' at St. Arnaud, the title of the Plaintiffs was based on (1) A certificate of title under the "Transfer of Lands Statute," that they were lessees of the Crown for thirty years; and (2) A sale by a special bailiff appointed by a Judge of the Supreme Court on the application of a judgment creditor of the prior lessee.

Held, (1)

That the Plaintiffs could recover on the certificate of title alone; (2) That the special bailiff was well appointed, St. Arnaud being more than 100 miles from Melbourne, although less than that from a circuit town; and (3) That the month's notice of sale required by 19 Vic., No. 19, sec. 176, does not apply to the sale of a term of years.

TRESPASS: in the first count, for breaking and entering, a close of the Plaintiffs' at St. Arnaud; in the second, for breaking and entering certain buildings upon part of the said close, known as the mill and engine-house, depriving Plaintiffs of the use of the same, and preventing them selling the machinery to *Charles Seal* and *Charles M. Watson*. Pleas—Not guilty. That the close was not Plaintiffs'. That the buildings and machinery were not Plaintiffs'; and, That Plaintiffs had been guilty of fraud.

On 11th September, 1865, a lease for 30 years, of the ground, the subject of this action, was granted to *William Clarke*, who held as trustee for the Pioneer Silver Mines Company, who occupied the ground and worked the mine. On 26th November, 1868, judgment was signed in an action against the company, and a writ of *fi. fa.* issued. By an order of *Barry, J.*, a special bailiff was appointed to levy the amount of the debt and costs under the writ. The bailiff arrived on the ground on the 27th November, and advertised the lease and plant for sale on the 28th, on

which day he sold to the Plaintiffs, who then entered into possession, and obtained a certificate of title under the "*Transfer of Lands Statute*." On the 19th February, 1869, an order of the Court of Mines for winding up the company, was made. On 27th February, the Defendant, as official agent, demanded possession from Plaintiffs, and, being refused, took forcible possession. The jury negatived the plea of fraud, and returned a verdict for Plaintiffs, damages £500.

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A rule *nisi* was obtained for a nonsuit on the grounds (1) That there was no power to appoint a special bailiff; and (2) That the sale was illegal as it had not been advertised for thirty days.

Fellows and *Dobson* now shewed cause. The Act under which the special bailiff was appointed is 15 *Vic.*, No. 10, sec. 24. That section only authorises the sheriff to execute writs 'when directed to him. Where they are not directed to him but to another person, that other person may execute them. There are no negative words in the clause; and the affirmative words do not exclude the power to appoint a special bailiff. But *St. Arnaud* is more than 100 miles from Melbourne; and therefore, even if the writ were otherwise directed, there would be power to appoint a special bailiff. The 100 miles are not to be reckoned from the place where a Circuit Court is held, but from Melbourne, where the Supreme Court is held.

As to the second point, the Act 19 *Vic.*, No. 19, sec. 176, enacts that "no houses, lands and other hereditaments and real estates, shall be sold under any such writ "until one month next after notice of the time and place of "such sale shall have been published in the *Government Gazette*, and in some newspaper circulating in the neighbourhood of such houses, lands, and other hereditaments,

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"and real estates." The words "houses, lands, and other hereditaments and real estates," are defined in a previous part of the same section to comprise "an equity of redemption, and also all interest to which the execution debtor is entitled in any houses, lands, and other hereditaments, corporeal or incorporeal, and real estates in Victoria, and which he might, according to the laws of the said colony, have disposed of." This language does not include a lease for a term of years, which is only a chattel interest. The Colonial Act is founded on the Imperial Statute, 54 Geo. III., cap. xv., and it provides only for "houses, lands, and other hereditaments and real estates." The question arose whether these words included an equity of redemption, and therefore words have been inserted in the 19 Vic., No. 19, to include such an interest, but no provision is made for a lease for a term of years, which is the title in this case.

The Plaintiffs, however, do not rely only on the sale by the sheriff. They have a certificate of title, issued to them under the "*Transfer of Lands Statute*." Even if the sale by the sheriff were illegal, the Plaintiffs can maintain the action.

Higinbotham and *C. A. Smyth* in support of the rule. A judge can only appoint a special bailiff to execute a writ in places more than 100 miles from the place where the Supreme Court is holden. When the Act 15 Vic., No. 10, was passed, there was only one Supreme Court, and it was holden at Melbourne; but subsequently Circuit Courts were established in various parts of the colony, among other places at Ararat, which is less than 100 miles from St. Arnaud. It has been held that the Circuit Court was only the Supreme Court sitting at that place, and therefore the provision of section 24 of the 15 Vic., No. 10, does not apply.

On the second point, 19 Vic., No. 19, sec. 176, evidently refers to personal property, for it vests in the

sheriff all "powers" belonging to the execution debtor, and a "power" is certainly personal. In regard to the certificate of title, Plaintiffs only obtained it as directors of the Company, and are therefore trustees for it. Though the "*Transfer of Land Statute*" does not recognise trusts, yet as this is a case where the official agent is protecting the rights of the Company, he can claim from the Plaintiffs as trustees for the Company.

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STAWELL, C. J.—We think that the certificate of title sufficiently supports the Plaintiffs' right to bring this action. But apart from this, we think they are entitled to succeed.

As to the first objection, we see no reason to hold that the special bailiff's appointment was irregular. By the Act 15 Vic., No. 10, provision was made for the state of things which existed at the time. Subsequently it became necessary to establish Circuit Courts in different parts of the colony; the 15 Vic., No. 10, was found to require amendment, and therefore the second Act, 19 Vic., No. 13, was passed. Section 24 of 15 Vic., No. 10, as far as it goes, if not looked at with the subsequent statute, admits of no doubt. No reference whatever is made to the Circuit Courts, but by it the sheriff is not compelled to go 100 miles from the place at which the court is holden. That means the Supreme Court. And in cases 100 miles from the court a special bailiff may be appointed. After that section had been enacted a new state of things arose, and the colony was carved into circuit districts, having reference to the centres of population. The sheriff of the colony was not to execute writs within the bailiwicks of the other sheriffs appointed by the 19 Vic., No. 13, but in every other respect 15 Vic., No. 10, was unaltered. And unless there is an express repeal, or we can gather by a fair and reasonable intendment, that the provisions of an Act are meant to be repealed, we must hold that the Legislature

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meant that they were still to remain in force. If this objection is to prevail, there may be places beyond the jurisdiction of any sheriff. Thus a place more than 100 miles from a circuit town, if within that circuit district, could not be reached either from the circuit town, as it is too far off, or from Melbourne, as the place is within a circuit district.

As regards the other point, the statute 54 *Geo. III.*, provided that land might be seized and sold under execution as chattel property. Some difficulty occurred as to whether an equity of redemption came within the words of that enactment, and an Act was passed to provide for this difficulty. The recent Act consolidates all these provisions, and simplifies the matter by providing one general mode of execution and sale. Substantially all interests in land, legal or equitable, may be sold, and thirty days' notice of sale must be given. The Act removed restrictions where they had previously existed, but it imposed no restrictions upon selling where there were no difficulties. A term of years is clearly a chattel interest, and is not an interest for which the Act provides. I think the rule ought to be discharged.

BARRY, J.—The judges here instead of having to go through the expensive formality of getting commissions issued authorising them to hold assizes throughout the country, are empowered by statute to hold *nisi prius* sittings in different parts of the country. These Circuit Courts, as they have been called, are extended as the country becomes more and more populous. But the Act never established a Supreme Court in these towns in the sense in which a Supreme Court has been established in Melbourne. The record in every case tried in a Circuit Court has to be brought to Melbourne to be made up, in the same way as in England it is brought to Westminster. Judgment can no more be signed in the country here, than it can be in

England. The record goes into the country ; it is tried in the country ; but it comes back to the Supreme Court at head quarters to be made up, and judgment entered upon it. It is not to be supposed that this is a hydra-headed Court, sitting in different parts of the country at the same time. I think, however, that the question of distance does not arise, for this writ is not addressed to the sheriff, and therefore he cannot be called on to execute it.

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Rule discharged.

IN THE MATTER OF HUGH GLASS.

RULE *nisi* to rescind an order made by *Stawell*, C. J., in Chambers, discharging, on a writ of *habeas corpus*, *Hugh Glass* from custody (a).

July 3.

The Court has no jurisdiction to rescind an order of a Judge in Chambers, made on the return of a writ of *habeas corpus*.

Michie, Q.C., and *Billing* appeared in support of the rule.

Ireland, Q.C., *Adamson*, and *Hearn*, *contra*, took a preliminary objection, that the Court had no jurisdiction to rescind the order of a Judge made on the return of a writ of *habeas corpus*. The common law on the subject is regulated by the act of *Charles II.*, by which a Judge can grant a writ of *habeas* in vacation or term. The Judge has an original power in the matter apart from the Court. His decision is final; and the discharge of a prisoner by a Judge on a writ of *habeas* is incapable of review by any other tribunal. It is a proceeding at common law ; an adjudication *in rem*, taking effect at once upon the person ; and the prisoner becomes immediately a free man. An appeal to this Court from the order is therefore an abortive proceeding. No precedent for such an application can be found.

(a) *Vide Ante*, p. 45.

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If such review were allowed, the books would contain some instances of them; and a remark of Lord *Denman* in *Leonard Watson's Case* (*b*), to the effect that the Judges should assist each other in determining these cases, shews that no review is permitted; for if the Court could review the decision of the Judge there is no use in the other Judges assisting him. An appeal even to the highest tribunal is out of the question, by reason of the state of the parties and the circumstances. [*Barry, J.*—Section 6 of the Act of *Charles II.* appears to provide for persons being committed the second time.] That only relates to the Court by which the commitment took place originally; not the Court, or reviewing Court that discharges him. The House of Assembly might re-arrest on another warrant; but not the Court that discharged the prisoner. The Judge in a *habeas corpus* case is not exercising the jurisdiction of the full Court, but an original power of his own, which he possesses at common law, and which is regulated by statute. In the *Aylesbury* case, there was a resolution by the House of Commons that there could be no appeal to a court of error from the Court of Queen's Bench on a writ of *habeas*.

Michie, Q.C., would leave the preliminary objection to the consideration of the Court. [*Barry, J.*—Do you say nothing because nothing can be said? I do not put it in that way. [*Barry, J.*—Then I think the Court is entitled to some assistance.]

STAWELL, C. J.—The Court must consider the case.

At a later period of the day.

STAWELL, C. J.—We have considered this case during the adjournment, and have come to the conclusion to discharge the rule.

Adamson inquired whether the Court would give costs to Mr. *Glass*.

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STAWELL, C. J.—We say nothing about costs. The costs will therefore fall to the ground; neither party receives them.

Rule discharged.

REGINA v. NAPIER.

RULE *nisi* to prohibit justices at Broadmeadows, from enforcing an order made in a cause of *Jackson v. Mansfield*, by which *Mansfield* was ordered to replace a fence he had removed, and pay a fine of £1 1s., with 5s. costs.

July 3.

On a rule to prohibit justices enforcing an order, if depositions have been in fact taken before the justices, they must be produced.

Mackay shewed cause.

F. L. Smith in support of the rule.

A preliminary objection was taken that the applicant ought to have brought up the depositions taken at the Police Court, or affidavits stating that no depositions were taken. The main point involved was that the affidavits shewed that a question of title was involved, which ousted the jurisdiction of the magistrates.

STAWELL, C. J.—With reference to the preliminary objection, that the depositions ought to be produced, or that the affidavits should shew there were no depositions, we do not think that, in this instance, it can be sustained. Where no depositions are taken, but merely notes by the justice or the clerk, they are no better as evidence than a statement by a witness present in Court, and who has himself heard the evidence given. Where depositions are

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taken they are read over to the witness, are the best evidence, and must be produced; but in the present case, we think, the fair inference, apart from the practice which we know prevails, is that no depositions were taken. As to the merits, the applicant's statement is uncontradicted, and shews a question of title sufficient to oust the jurisdiction of the magistrates.

BARRY, J.—If we were to hold the preliminary objection good, we would be laying down a rule that in all these cases depositions ought to be taken. It is no doubt convenient to have the best evidence; but the Act only requires the application to be made upon affidavit.

WILLIAMS, J., concurred.

Rule absolute for prohibition.

DARTON v. KNIGHT

July 3.

The Loyal
 Brothers'
 Lodge, No. 3,
 Geelong, of
 Oddfellows,
 was suspended
 by the Com-
 mittee of the
 Grand Lodge,
 for having, as
 was alleged,
 violated the

APPEAL by special case from Petty Sessions at Geelong.

The complainant was *Walter E. Darton*, district deputy grand master of the Ancient and Independent order of Odd Fellows; the Defendants were *Edward Knight* and *Henry A. Isard*, the trustees of the Loyal Brothers Lodge, No. 3, Geelong. The Defendants were summoned before the constitution by-laws, rules, and regulations, of the Grand Lodge; and the trustees of the Lodge No. 3 were notified of this, and a demand made upon them to transfer £600 in their possession, belonging to Lodge No. 3, to the Grand Master of the Order. The trustees, on the instruction of the Lodge No. 3, refused to comply with this demand. Thereupon an information was laid against the trustees by the District Deputy Grand Master, under the "*Friendly Societies' Act*," sec. 36.

Held, that the case did not come within that section, which was a penal one relating to the misapplication of money, whereas these Defendants were holding the money as trustees, under directions from the lodge that appointed them.

magistrates "for that on the 11th January, 1869, it was reported to the standing committee of the Grand Lodge of the order that the subordinate lodge, called the Loyal Brothers Lodge, No. 3, at Geelong, had violated the constitution, by-laws, rules, and regulations of the Grand Lodge, and, as it appeared to the said standing committee, on due inquiry, that the said subordinate lodge had violated the constitution, by-laws, rules, and regulations of the Grand Lodge, the said committee did suspend the said subordinate lodge for a period of six months from 22nd January, 1869; and the trustees of the subordinate lodge (the Defendants) were duly notified of these facts, and a demand was made upon them to transfer £600 in their possession, belonging to the said lodge, to *J. B. Crews*, grand master of the order, and to *Edwin Darton*, *Henry Vine*, and *W. H. Lock*, the trustees of the order, or one of them; but the Defendants had jointly and severally refused to comply with the said demand, and did improperly withhold the said money." It appeared that a majority of the subordinate lodges of the order had agreed to become affiliated with the American Order of Odd Fellows, to use their ritual and books. The Loyal Brothers Lodge used the ritual for some months, but in January last declined to recognise the alteration of the constitution. On this it was suspended by the committee of the order, and the trustees were asked to deliver up the moneys in their possession, to be held by the order in trust till the Loyal Brothers Lodge had become subordinate in fact as well as in name. The information was laid under section 36 of the "*Friendly Societies' Act*," and the objection taken before the magistrates, and on which the case was dismissed, was that the case did not come within that section, which was a penal one, while this dispute, at the most, was a civil one.

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Mackay, for the Appellants (Complainants below).
Yeates v. Roberts (c), *Clough v. Ratcliffe* (d), *Dewhurst*
(c) 3 Drew, 177. (d) 1 De G. & Sm., 164.

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v. Clarkson (e), and *Grimes v. Harrison (f)*, shew the power of the Grand Lodge to alter the rules and compel the obedience of the subordinate lodges. That being so, the Loyal Brothers Lodge was properly suspended for insubordination, and its money became vested, according to the rules, in the officers of the Grand Lodge. As the trustees of the Loyal Brothers Lodge did not give up the money, they must be taken as improperly withholding the money, and the case therefore comes within the 36th section of the Act.

J. W. Stephen, for the Respondents (Defendants below), was not called upon by the Court.

STAWELL, C. J.—We think the first objection taken below is unanswerable. The 36th section does not refer to payment of debts, for we cannot suppose that the Legislature would violate the common rule by treating non-payment of a debt as an actual offence. The clause corresponds with section 24 of the English Act, the 18 & 19 *Vic.*, cap. lxiii., which relates to offences punishable as fraudulent. The proviso in the latter part of the section bears out this view, and the words of the earlier part of the section confirm it. Two justices may hear and determine a matter, and, upon conviction, the Defendant is to repay double the money withheld. "Upon conviction," shews the offence is a criminal one; for these words are very proper to use as regards a criminal offence, but perfectly inapplicable in the case of payment of a debt. The district lodge objected to an alteration in the constitution of the Order, and instructed its trustees to hold its money for it. They obey that order, and the central body—whether rightly or wrongly, we do not now determine—say that they are mistaken in so doing. This is a very difficult point, and one that will require much discussion. But certainly those who dispute it are not to be regarded as

(e) 23 L. J., Q. B., 247.

(f) 28 L. J., Ch., 823.

quasi criminals, and sent to goal for disobedience of its orders. The mere statement of the proposition is enough to alarm one. The statute relates to the misapplication of money—these Defendants were not misapplying it; they were merely holding it as trustees, under directions from the lodge that appointed them.

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Appeal dismissed with costs.

REGINA v. POHLMAN.

RULE *nisi* for a *certiorari* to quash an order made by the General Sessions for the county of Bourke.

July 6.

The Borough Council of Emerald Hill, acting as the Local Board of Health, desired to construct a drain through a piece of ground on which the Oddfellows'-hall stands, and notified the trustees of the hall of their intention to make the drain. The trustees objected to the drain being made, as unnecessary, and refused to accept any compensation from the Borough Council, or to treat as to the amount of compensation to be paid. The Council, under the "*Public Health Amendment Act*," No. 310, sec. 48, appealed to the General Sessions to fix the amount of compensation to be awarded to the Oddfellows. The justices at the General Sessions considered that they were entitled to inquire into the necessity for the drain; and having taken evidence on that point, they, on the 22nd April, 1869, dismissed the appeal, and made the following order:—"Upon reading the petition and notice of appeal in this

A Local Board of Health appealed under No. 310, sec. 48, to General Sessions, to fix the amount of compensation to be paid to the owners of land, through which it was proposed to make a drain. The General Sessions considering that the drain was unnecessary, made an order dismissing the appeal with costs, "subject to special case," but no special case

was stated. On rule *nisi* for *certiorari* to quash this order,

Held, that the order was invalid; that in appeals under No. 310, sec. 48, the General Sessions has no power to give costs; that the General Sessions could not enquire into the necessity for the work, but only into the amount of compensation; and rule made absolute.

Semble, the paying of the compensation is a condition precedent to entering upon the land.

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matter, and upon hearing counsel for the above-named Appellants and Respondents, and the evidence of the several witnesses examined in this cause on behalf of the Appellants and Respondents respectively, it is ordered that the appeal herein be dismissed with £48 13s. 6d. costs, to be paid by the said Appellants to the said Respondents, or to Mr. *Thomas Pavey*, their attorney, subject to special case." No special case was stated, and on the 29th June a rule *nisi* was obtained on behalf of the Borough Council for a *certiorari* to quash the order, on the following grounds:—That the Court of General Sessions had no authority to inquire into the necessity for constructing the drain; that it had no power to order costs; that the order was not a final one; and after the making of the order there was, and could be, no special case.

Higinbotham and *Webb* shewed cause. The 48th section of the "*Public Health Act*" gives the General Sessions power to inquire into the necessity for the drain. The words at the commencement of the section: "In case it is necessary, for the proper drainage or cleansing of any land," govern the whole clause. The jurisdiction of the General Sessions only arises in the case of a drain being necessary; and in order to ascertain whether they can entertain the appeal, they must determine whether the drain is necessary. If not, the order of the Council to make the drain is bad, and no question of compensation arises. The "dispute" mentioned in the section does not refer to a dispute about the compensation only, but one on the whole question, including the necessity for the drain. The appeal was premature, for the Local Board must do the work before the compensation can be assessed, or otherwise it would be impossible to assess it properly. The compensation is to be given not merely for the land taken, but for the injury to the land that remained, and this cannot be ascertained until the work is done: *Lister v. Lobley* (g).

(g) 7 A. & E., 124.

The Court of General Sessions had power to give costs. The Act, No. 267, sec. 143, gives the Court power to make such order in relation to the matter, and as to costs in such appeal, and in any other appeal that may by law come before it, as to the Court may seem fit. The appeal in this case was one authorised by law, and therefore costs could be given. The words "subject to special case," are surplusage, and can be omitted without affecting the validity of the order.

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Adamson for the rule. The order is a contingent one, and the words "subject to special case," cannot be omitted from it. The justices could not give costs, for the words "any other appeal," mean any other appeal of the class referred to in the preceding sections—appeals from convictions at Petty Sessions. On the objection as to the necessity for the drain, the "*Public Health Statute*" gives a summary way of assessing compensation; and where the amount tendered by the council is not thought sufficient by the owner, the assistance of the General Sessions is to be invoked, but the Sessions have nothing to do but assess the compensation. *Horrocks v. The Metropolitan Railway Company* (h).

STAWELL, C. J.—We think this order invalid. It was pronounced subject to a special case, but the time for stating a special case has passed, and the Court adjourned without stating the case. The order is a fruitless one; it neither dismisses the appeal nor upholds it. Then as to the costs. The "*Justices Act*," authorising costs, refers to appeals from justices. A general power is given by it to entertain appeals in all cases, subject to certain limitations as to the minimum amount of fine, and the minimum imprisonment. They must exceed a certain limit, otherwise no appeal will lie. But other appeals will lie in certain cases where the minimum is not reached, and it is to these the

(h) 4 B. & S., 315.

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words "other appeals," in clause 143, refer. This is not an appeal in the proper acceptation of the term. It is an attempt to apply provisions of the "*Lands Clauses Consolidation Act*" to a certain state of things to which they are not, in our opinion, applicable. The dispute mentioned in the "*Public Health Statute*" must be a dispute about the amount of payment, and nothing more. In the case of *Horrocks v. The Metropolitan Railway Company*, one of the judges (Mr. Justice Willes) differed at first from the others, but ultimately adopted the opposite view. That was the case of an arbitrator. The powers of an arbitrator under the English Act are analogous to those of the General Sessions here; and it was held that the arbitrator had no power to enter upon any other question than that of compensation. So far as the analogy goes, that case is decisive of the present. The mere fact of a dispute about the amount of equitable compensation was sufficient to cause the matter to be referred to the General Sessions, and that was the only preliminary required to give the sessions jurisdiction to assess the damages. As regards payment of the money before the ground is taken, that may be debatable, although generally an owner is too glad to take money, without waiting till the work is finished. I am inclined to think that the payment of the money is a condition precedent to the going on the land. Where the owner is known, arrangements can be made with him; where he is not known, the Local Board can act without him. However, we do not decide that point now. We think that the General Sessions, as arbitrators, could not inquire into the necessity for the work, but could only inquire into the amount of compensation. On all these grounds, we think, the order cannot be sustained.

Rule absolute.

GOLDSBROUGH v. McCULLOCH.

1869.

April 18.
July 10.

ACTION of detinue for wool, detained by Defendant. Plaintiffs in detinue for the recovery of wool from a carrier who claimed a lien for carriage, proved two statutable liens over the wool, given to them by *D. & Co.*, by whom the wool had been delivered to the Defendant for carriage. At the trial it was admitted that there were two prior unsatisfied mortgages by *D. & Co.* of the sheep from which the wool had been shorn; and no sufficient evidence was given of the consent of the mortgagees to the giving of the liens.

Pleas—1. *Non detinet*. 2. Not possessed. 3. Lien as a common carrier. 4. That this wool, with other, was delivered to Defendant by *F. and G. Desailly*, for carriage from Mossiel to Melbourne, defendant being a common carrier; and that he detained the wool in question for the carriage due upon it, and upon other bales delivered to Plaintiffs. 5. That the wool became the Plaintiffs' property under two mortgages, dated 27th April, 1867, and 20th February, 1868, by *F. and G. Desailly*; and it was after the first mortgage, and before the second, that the agreement between *Desailly* and the Defendant for the carriage was made. The sixth plea alleged the lien in another form. Replication as to fourth and fifth pleas, that the agreement for carriage was made without the privity of the Plaintiffs, and that the wool was the Plaintiffs'; and, on equitable grounds, that *F. and G. Desailly* became embarrassed, and called a meeting of creditors, at which Defendant attended, and agreed with the other creditors to give them a letter of licence for eighteen months, undertaking that if the *Desaillys* were molested during that interval, the creditor's debt should be considered discharged; that Defendant interfered with and molested *Desaillys* by detaining this wool, and that the objection of the want of consent by the mortgagees, was one which the Defendant was at liberty to take: *Clough v. Laing* distinguished.

A carrier has no lien for carriage of goods given to him, without the privity or consent of the true owner, for the purpose of being carried.

Where a replication is pleaded "on equitable grounds," and cannot be sustained as an equitable defence, the Court will not reject these words, where the plea is put forward substantially as well as in terms, as a replication in equity.

Semble, that a debtor who assigns all his property to trustees for the benefit of his creditors, on the faith of an agreement on their part that the debts due to them should be suspended, if not extinguished, ought not afterwards to be sued by those creditors for the same debts.

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wool. Rejoinder, that the agreement for carriage was made for the Plaintiffs' benefit; that the Defendant did not grant a letter of licence; that the debt for the carriage of the wool was excluded from the debt in the letter of licence; and demurrer to one replication that it did not allege that Defendant had released his debt or deprived himself of the right to his security. Plaintiffs also demurred to the rejoinder of Defendant alleging the exclusion of the debt from the letter of licence, that it shewed a fraud upon the other creditors.

At the trial the jury found a verdict for Defendant, and in answer to questions, stated that Defendant was a common carrier; that the debt due for the carriage of the wool was excluded from the letter of licence; that the agreement for the letter of licence was made before Defendant refused to give up the wool, although Defendant had intimated to Plaintiffs that he would hold the wool for his carriage.

The Plaintiffs obtained a rule *nisi* to enter a verdict for Plaintiffs, on the following grounds:—1. That Defendant was not a common carrier. 2. That Plaintiffs were not indebted to him. 3. That Defendant had no lien as against Plaintiffs. 4. That the composition arrangement extinguished the debt. 5. That Plaintiffs were not privy to the act of *Desailly*..

Higinbotham, *Wrixon*, and *Williams* shewed cause. As the Plaintiffs were not the first, but the second mortgagees of *Desailly's* clip of wool, they could not have any property in the clip under the Act of New South Wales, 11 Vic., No. 58. At all events the consent of the prior mortgagees was necessary—as to some stations the English, Scottish, and Australian Chartered Bank; as to others, the Melbourne Banking Company. The only consent proved as to the first was a letter by the manager, Mr. *Tyssen*; and he had no authority to bind the bank. As to the other, no

proof whatever was given of the consent of the Melbourne Banking Company. As to the Defendant being a common carrier, the finding of the jury was sufficient on that point, if there was any evidence to sustain the finding; and Mr. *McCulloch* and his partner both swore they were common carriers to Mossiel, and would carry for any one that sent to them. As to the lien, it has already been held by the Court that Defendant had a particular lien on the goods carried. As to the letter of licence, the evidence and the finding of the jury were distinct that Defendant declared that his debt for this wool was not included in it. The *Exeter Carriers' Case* (j), *Thomas v. Courtney* (k).

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Michie, Q.C., and *Fellows* for the rule. The evidence that Defendant was a common carrier was not sufficient, as Defendant did not travel at stated intervals between two termini. Nor could he claim a lien against the Plaintiffs. A mortgagee could ignore a carrier's lien and get the goods; he must be paid by the person that engaged him. *McCulloch* had also clearly extinguished his debt, for he said nothing at the meeting of creditors about the debt for the wool being withheld (his other claims only amounting to about £200). Nor could he take advantage of the other creditors. As to the validity of the Plaintiffs mortgages, the Defendant, claiming as he does through *Desailly*, cannot dispute them.

The authorities quoted were—*Pickford v. Grand Junction Company* (l), *Story on Bailments* 588, *Cockshott v. Bennett* (m), *Tatlock v. Smith* (n), *Britten v. Hughes* (o), *Harry v. Wall* (p), *Knight v. Hunt* (q), *Buck v. Shippam* (r), *Cork v. Saunders* (s), *Cowper v. Green* (t),

- (j) 2 Lord Raym., 868.
- (k) 1 B. & Ald., 1.
- (l) 8 M. & W., 372.
- (m) 2 T. R., 763.
- (n) 6 Bing., 339.
- (o) 5 Ib., 460.

- (p) 1 B. & Ald., 103.
- (q) 5 Bing., 432.
- (r) 1 Ph., 694.
- (s) 1 B. & Ald., 46.
- (t) 7 M. & W., 633.

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Cowell v. Simpson (v), Mallalieu v. Hodgson (w), Gibbons v. Vouillon (x), Clough v. Laing (y).

Cur. adv. vult.

The demurrers were then argued by *Fellows* and *Higinbotham*, but the authorities quoted were those already cited.

Cur. adv. vult.

July 10.

STAWELL, C. J., read the judgment of the Court upon the rule *nisi* as follows:—

Detinue for 141 bales of wool. Pleas:—Did not detain; not possessed; and lien for carriage. Of the last there were three, one in the common form, and two under special circumstances, upon all of which issue was joined. The other replications and subsequent pleadings, some of which were demurred to, need not, according to our view of the case, be specially mentioned. The Plaintiffs rested their claim on two statutable liens under the laws of New South Wales, given by a firm of *Desailly & Co.*, owners of several stations in that colony, on the clip of wool for the year 1867-8. The first, dated 27th April, 1867, was granted in consideration of £16,000 on the clip of 100,000 sheep depasturing over sixteen runs in the Lachlan district; and the second, dated 20th February, 1868, was given in consideration of £2,150, over the clip of 21,000 sheep depasturing on one of these runs—*Desailly & Co.*, according to the terms of each lien, agreeing that the sheep should be shorn at their own expense, and the wool delivered at the Plaintiffs' stores in Melbourne. The Defendant entered into a written con-

(v) 16 Ves., 275.
 (w) 16 Q. B., 689.

(x) 8 C. B., 483.
 (y) 1 W. & W., L., 20.

tract with *Desailly & Co.* for the carriage of this wool from their stations to Melbourne, and the whole, except the 141 bales, was duly delivered. A bill, for the carriage of part, was paid by the Plaintiffs on a certificate by *Desailly & Co.* of its correctness, and a further payment, as the Defendant contended, had been made on account—other part had been delivered without objection, and the remainder, less these 141 bales, was also delivered, the Defendant having apprised the Plaintiffs some time before this last delivery, that he would detain the 141 bales until the balance of his account for the carriage of the whole was paid him.

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Copies of the Acts of New South Wales 11 *Vic.*, No. 58 and 31 *Vic.*, No. 24, were received in evidence. It was admitted that they were in force, and that there were two unsatisfied mortgages of these sheep, one to the English, Scottish, and Australian Chartered Bank, and another to the Melbourne Banking Company; the Plaintiffs putting in evidence a letter dated the 27th April, 1867, from the English, Scottish, and Australian Chartered Bank, signed *G. E. Tyssen*, described as manager, and addressed to Messrs. *Desailly*, purporting to be a consent to their giving a preferable lien on the wool of the then ensuing clip, from the sheep depasturing on the stations mentioned.

At the close of the Plaintiffs' case, a nonsuit was moved for, on the ground that proof of their title had failed; that the sheep on which their preferable lien was given, had been previously mortgaged; and as regarded the first lien, it was expressly prohibited by the laws then in force; and as regarded the second, no sufficient consent by one mortgagee had been proved, and none whatever had been given by the other: that the form of action being in *detinue*, the articles detained should have been clearly identified; whereas these sheep had become so commingled that it was impossible, assuming even that one lien was valid, to trace

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the wool, and to distinguish that which did belong to the Plaintiffs from that which did not. The case was sent to the jury, who found for the Defendant, assessing the value of these bales contingently, and answering certain questions submitted to them, leave having been reserved to move to enter a verdict either for the Plaintiffs, for the value assessed, or for the Defendant, the Court having the same power as a jury to draw inferences of fact. In pursuance of this leave, the present rule was obtained to enter a verdict for the Plaintiffs on all the issues, except those demurred to, on the grounds that the Defendant was not a common carrier; that the Plaintiffs were not indebted to him; that the Defendant had no lien as against the Plaintiffs; that the composition arrangements extinguished the debt; and that the Plaintiffs were not privy to the acts of *Desailly*.

The Plaintiffs at the outset are obliged to remove the objections taken by way of nonsuit at the trial. Their right to maintain the action must first be established, in order to enable them successfully to attack that of the Defendant to defend it. It is unnecessary, therefore, as yet to enter on the grounds set forth in the rule. But in passing, we may observe as to the objection to the sufficiency of proof of the Defendant having been a common carrier, that the peculiar circumstances of a new country must necessarily render it difficult to fix the times of arrival and departure for the interior, with anything approaching the certainty which may easily be observed in the case of an old and established community possessing all the attendant facilities of communicating from place to place within its limits; and that, although as a general rule a mortgagor cannot give a second mortgage or lien so as to conflict with the rights of the first mortgagee, yet, as in this instance, by the terms of the original lien or mortgage itself, the article mortgaged—wool—was to have been delivered at the stores of the mortgagees, and as the

statute enables them to add all expenses of such delivery to the original debt, it may be questionable whether the contract for carriage made by the mortgagor ought not, so far as the carrier is concerned, to be regarded as a putting into execution the original arrangements between him (the mortgagor) and his mortgagee.

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The Legislature of New South Wales, in passing the Acts 7 *Vic.*, No. 3, 11 *Vic.*, No. 4, 11 *Vic.*, No. 58, and 31 *Vic.*, No. 24, enabling the owners to execute without delivery, or change of possession, mortgages of either stock or wool, which would be valid against all subsequent incumbrances and insolvencies, deemed it expedient to prohibit in express terms the giving a "preferable lien," as it is termed, on the wool of stock already mortgaged. The reasons for this precaution are sufficiently obvious, and the terms of the enactments admit of no doubt. This prohibition, however, was relaxed by the last Act, 31 *Vic.*, No. 24, which allowed such a lien to be given, with the consent in writing, of the mortgagee. All these Acts, except the last, were in force in this country before its separation from New South Wales, and were subsequently continued by the statute 13 and 14 *Vic.*, cap. lix., sec. 25; and an Act similar to the last was passed by the Legislature of Victoria, and has been in force for some years. The subject, therefore, is one with which we are not unfamiliar. No question arises as to either mortgage to the banks, though the details of that to the Melbourne Banking Company have not been so fully specified as those of the mortgage to the other bank; both are in existence, and unsatisfied. With the exception of Mr. *Tyssen's* being manager—which fact was rather conceded than proved—there was no evidence of his authority to consent on the part of the bank to the mortgagor giving a preferable lien on this wool—an act not falling within the ordinary course of banking transactions, and which, as the Defendant contended, was not included in the authority conferred by implication on him as manager.

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The Plaintiffs, in answer, only urged that the principle enunciated by this Court in *Clough v. Laing* ruled the present case, and that the Defendant was estopped from taking this objection. The facts of the two cases are not, in our opinion, at all analogous; in the one the official assignee of the mortgagor, who had become insolvent, endeavoured to defeat a lien granted by the insolvent whose estate he represented, and the Court held that the assignee was in no better position than the mortgagor himself; and that as the one could not set up his first mortgage to defeat his second, so neither could the other. But, in the present case, the Defendant does not claim through the mortgagor, nor does he represent him; though he received the goods from the mortgagor, he claims in opposition to him. His power to have granted these preferable liens is not disputed; the Plaintiffs are merely put to proof of the fact. The principle prohibiting anyone from averring against his own deed is not violated, for it cannot, we think, be extended or applied to the position occupied by the present Defendant. Nor is it a case of estoppel; there is no mutuality, the Defendant is not estopped. To hold, as the Plaintiffs contend, that the Defendant was not at liberty to take this objection, would be in effect to decide that a second mortgagee must, on proof of execution by his mortgagor of a deed purporting to be a prior mortgage, at once admit that all requirements of any statute necessary to give validity to such first mortgage had been fully complied with. Such a proposition does not appear to us tenable. We can discover no sound reason why a pawnbroker, for instance, to whom goods have been pledged, should not dispute the validity of a bill of sale previously given by the owner of the goods to some third person, on the grounds that the provisions of the "Instruments and Securities Act" had not been observed. Indeed, the present objection is one rather admitted by the Plaintiffs, and which they ineffectually endeavour to remove, than taken by the Defendant. It is not disputed that these mortgages exist and are unsatisfied.

Their effect is met, it is said, by the letter from one mortgagee giving consent to the granting a lien to the Plaintiffs. By the plea of not possessed, the plaintiffs are compelled to prove their title. The onus of so doing rests with them, and were that title complete by proof of the execution of the documents of April, 1867, and February, 1868, the letter of consent need not have been put in evidence. In this case, the defendant merely invites attention to the circumstance that the Plaintiffs have failed to prove their case. We think, however, that, if necessary, he would be at liberty to adduce proof of facts to establish that failure. The only answer given to the objection taken by way of nonsuit in our opinion fails, and that objection must therefore prevail.

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Rule nisi discharged.

STAWELL, C. J., also read the judgment of the Court upon the demurrers, as follows:—

In this same case there were demurrers to replications and cross-demurrers to rejoinders. Declaration in detinue for 141 bales of wool. The fourth plea was to the effect that 1,200 bales, of which the 141 were part, had been delivered by *Francis* and *George Desailly* to the Defendant, under an agreement for conveyance thereof by the Defendant as a common carrier for hire from Mossgiel to Melbourne; that the Defendant conveyed all the bales, and at the time of the detention had a lien for money payable to him for that conveyance as a common carrier, and the money being unpaid he detained them as a lien and security therefor. Fifth plea, that the said bales of wool were the goods of the Plaintiffs by two agreements, made between them and *Francis* and *George Desailly*, on the 27th April, 1867, and 20th February, 1868, and that these and other bales, in all 1,200, had been delivered by the said *Francis* and *George Desailly* to the Defendant for conveyance, as in the fourth plea. To the fourth and fifth pleas, replications.

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Secondly, that the agreements between the Defendant and *Francis* and *George Desailly* were made without the privity of the Plaintiffs, and thence up to the commencement of the suit, the whole of the goods in the pleas mentioned were the goods of the Plaintiffs. Thirdly, on equitable grounds, that *Francis* and *George Desailly*, being indebted to the Defendant for conveyance of the said goods, and also to divers other persons, were in insolvent circumstances, and unable immediately to pay their debts; and after the conveyance and before the detention, it was mutually agreed between *Francis* and *George Desailly* and the Defendant and their other creditors that, in consideration of their assigning and conveying by way of mortgage certain properties to trustees for the Defendant and the other creditors, to secure their respective debts, the Defendant and the other creditors agreed with *Francis* and *George Desailly*, and with each other, to give *Francis* and *George Desailly* a letter of licence for eighteen months; and the said licence was to be sealed with the seal of the Defendant and the other creditors, and was to contain a provision that if any of them during its continuance molested or interfered with *Francis* and *George Desailly*, they should be acquitted and discharged from the debts due to such creditor; that *Francis* and *George Desailly* assigned and conveyed the said properties to trustees, to secure creditors, and that the Defendant molested them by detaining the said goods, and then acquitted and discharged them from the said debt; and, fourthly, that *Francis* and *George Desailly* being indebted, as in the third replication, it was mutually agreed between them and the Defendant and the other creditors also, as in the third replication, that the said properties comprised all the estate and effects of the said *Francis* and *George Desailly*, who assigned and conveyed them as in the third replication. There were demurrers to these 2nd, 3rd, and 4th replications, and to the 3rd there was a rejoinder on equitable grounds, that the debt due to the Defendant for conveyance of the said goods was excluded from the

operation of the alleged arrangement, whereof *Francis* and *George Desailly* had notice, and they did not convey, nor did the trustees hold, the properties for securing the amount of that debt; and to this rejoinder there was also a demurrer. Our judgment just delivered, refusing to disturb the verdict for the Defendant, has decided the case substantially in his favour. It is necessary, however, to consider the present demurrers, although our decision on them affects the question of costs only.

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The second replication, in effect, denies a carrier's right of lien for the conveyance of goods given to him for the purpose of being carried, but without the privity or consent of the true owner. The affirmative of this proposition rests solely on the authority of the *Exeter Carriers'* case, mentioned in *York v. Greenough* (z), and the views Lord *Holt*, by whom the case was decided, entertained on the subject. According to the opinion then expressed, the innkeeper and carrier were placed relatively in the same position—the one obliged to receive guests, the other to carry goods, whether payment was made or not. More recent decisions of the Court of Exchequer, cited during the argument, determine that a carrier is not obliged to carry goods unless payment is made beforehand for the carriage. The main ground on which the affirmative of the question rests being thus displaced, and no other having been urged in support, we think the second replication affords a sufficient answer to the pleas.

The third replication is pleaded on equitable grounds; but to the suit which should be filed to sustain the equity raised by that pleading, *Francis* and *George Desailly* would be necessary parties. As an equitable defence, therefore, it cannot be sustained. We should hesitate in a case of this kind, where costs alone are concerned, to reject these words, as we were invited to do, for the plea is put forward

(z) 2 Lord Raym, 867.

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substantially, as well as in terms, as a replication in equity. Even rejecting these words, it amounts to a mortgage by a debtor in insolvent circumstances of a part of his property to secure his creditors in consideration of an agreement on their part to grant him a letter of licence. In the absence of any decision, we are unable to regard this as a good replication at law, to either the fourth or fifth plea. We need not, therefore, consider the validity of the rejoinder.

The fourth replication has evidently been framed on the principles to be extracted from the judgments in *Cork v. Saunders*, *Britten v. Hughes*, and the other cases to which we were referred. They apparently recognise the proposition that a debtor who assigns all his property to trustees for the benefit of his creditors, on the faith of an agreement on their part that the debts due to them should be suspended, if not extinguished, ought not afterwards to be sued by those creditors for the same debts. There has been in this case—though all the debtors' property was duly assigned—no receipt by the creditors of any of the proceeds as dividends, nor have we been able to discover any decision on the point which goes the length of holding such a pleading as the present to be good; but, on the other hand, observations were made, both by Lord *Ellenborough* and *Tindal*, Lord Chief Justice of the Common Pleas, on the cases cited for the Plaintiffs, which appear to sustain the fourth replication. We do not feel at liberty, in opposition to such authority, to hold that on the facts pleaded the debt for carriage has not been suspended; and if so, the right to detain the goods in question, on the ground of a lien for that carriage, could not be maintained. Our judgment on the demurrers to the second and fourth replications will be for the Plaintiffs, and on the other demurrers for the Defendant.

PIZZEY v. SOUTHERN INSURANCE COMPANY.

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June 23.
July 10.

DEMURRER to rejoinder to Plaintiff's replication. The declaration was on a floating policy of insurance under seal, made between *Connell, Watson & Hogarth*, Plaintiff's agents, and the Defendants, "at and from Melbourne to port or ports in New Zealand or the Australian Colonies, or from thence to Melbourne, on merchandise, as interest might appear to be declared on shipment on or of ships or steamers; the premium to be charged on declaration of interest at current rates, and paid on the 10th day of the following month; to cover all shipments declared prior to 30th June, 1867." The declaration alleged that on 12th April, 1867, the interest in the said merchandise so intended to be insured was duly declared on shipment to be in the sum of £462 10s. on merchandise by the ship called the *Goldseeker* from Melbourne to Hokitika in New Zealand, and the said merchandise was so shipped, and was by the perils insured against wholly lost, and all conditions, &c. Breach that the Defendants had not paid the sum of £462 10s. The declaration also contained the common counts.

P., by his agents, effected a floating policy of marine insurance under seal over goods to be shipped at and from Melbourne "to port or ports in New Zealand," as interest might be declared. The declaration of interest was made by *P.*'s agents in a document not under seal, declaring the interest to be "in the sum of £462 10s. on merchandise by the ship *Goldseeker* to Hokitika, sea risk only." This declaration of interest was accepted by the assurers in a document not under seal, containing these words: "Risk to cease on

Pleas: (*inter alia*) 2nd. On equitable grounds, that *Connell, Watson & Hogarth*, as Plaintiff's agents at the time of declaring interest, agreed with Defendants to pay the current rate of premium for insurance between Melbourne and a port

arrival at outer anchorage." The current rate to the wharf at Hokitika was greater than that to the outer anchorage there, and the smaller rate only was paid. The ship and goods arrived safely at the outer anchorage, but were lost between that and the wharf. *P.* sued for the value of the goods, contending that the policy under seal covered all risk to Hokitika itself, and that his agents were not in fact authorised to limit the policy, and could not in law limit a sealed instrument by an unsealed one, so as to make it cover sea risk only.

Held on demurrer, that unless the declaration of interest by *P.*'s agents were deemed a formal and binding one, there was no policy at all; and that if it were accepted at all, it must be accepted as a whole; so that *quidcunque vid*, the Plaintiff must fail.

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of Hokitika called the outer anchorage, and that the said risk should cease on the ship's arrival at the said outer anchorage, and only paid Defendants that rate; that the current rate of premium between Melbourne and the wharf, Hokitika, was greater than that between Melbourne and the outer anchorage, of which *Connell, Watson & Hogarth* had notice; that the goods arrived safely at the outer anchorage, and that the said loss happened after and not before such arrival as aforesaid.

Replication to 2nd plea: (*inter alia*) 2nd. On equitable grounds that the agreement referred to in the 2nd plea, consisted of and was contained in a paper partly written and partly printed, being a declaration of interest by *Connell, Watson & Hogarth*, which was as follows:

To the Secretary

The Southern Insurance Company Limited,
 81 Queen Street,
 Melbourne, April 12th, 1867.

In terms of Policy No. now beg to declare Interest shown as under, and hand you Policy herewith in order that you may make endorsement of same.

Ship.	Voyage.	Interest.	Amount Insured.		
Goldseeker.	To Hokitika.	Sea risk only.	462	10	0
Total Invoice amount - - - - -					
Being valued at Invoice amount and per cent. added					
Amount attaching to Policy £			£ 462	10	0

CONNELL, WATSON & HOGARTH,
 W. S. Inglis.

and in another paper, partly written and partly printed, signed and delivered by the secretary of the Company to *Connell, Watson & Hogarth*, as follows:—

The Southern Insurance Company Limited.
Interim Declaration Note.

Melbourne, 12th April, 1867.

Messrs. Connell, Watson & Hogarth have this day declared Interest under Floating Policy No.....in the sum of *Four hundred and sixty-two Pounds 10/ stg.*, per *Goldseeker*, from *Melbourne* to *Hokitika*, on *Merchandise*.

Risk to cease on arrival at outer anchorage.

Memorandum, *David Moffat*, Secretary.
Amount declared, £462 10s. 0d. at 20/ %.

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and further, that the said agreement was not under seal, nor had *Connell, Watson & Hogarth* power to alter the policy declared upon by limiting the risk to sea risk only, or to assent to a condition that the risk should close upon arrival at outer anchorage.

Rejoinder to 2nd replication to 2nd plea: That the expressions "sea risk only," and "risk to cease at outer anchorage," were identical in their meaning, and meant that the risk should cease as in the 2nd plea mentioned.

Demurrer to rejoinder.

Higinbotham (with him *Williams*) for the Plaintiff. The question here is if the two documents set out in the replication and not under seal, can vary a contract under seal. The policy was for the carriage of goods to *Hokitika*, and not to the outer anchorage only, and it cannot be rescinded unless by an instrument as solemn as that by which it was made. *Connell, Watson & Hogarth* had no authority from Plaintiff to vary the policy. *Entwistle v. Ellis* (a), *Ralli v. Janson* (b), *Richardson v. Anderson* (c), *Sweeting v. Pearce* (d), *Baines v. Ewing* (e), *Wheatton v. Hardesty* (f).

(a) 2 H. & N., 594.

(b) 6 Ell. & Bl., 422.

(c) 1 Camp., 44.

(d) 9 C. B., N. S., 534; S. C.,

29 L. J., N. S., C. P., 26.

(e) L. R., 1 Ex., 320.

(f) 8 Ell. & Bl., 264.

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Fellows (with him *Webb*) for the Defendants. The terms of the policy have either been carried out or they have not. It required a declaration of interest to be made out before the policy could be effectual. If that declaration was not well made, on the ground that the "outer anchorage Hokitika," was not a port in New Zealand there is no declaration of interest at all, and the conditions of the policy have not been complied with. If, however, the Plaintiff accepted the declaration of interest, then he must be bound by it.

Higinbotham in reply. The pleadings admit that there was a declaration of interest on £462 10s. worth of goods shipped from Melbourne to Hokitika; and the declaration of interest shews that a port in New Zealand was named.

Cur. adv. vult.

July 10.

STAWELL, C. J.—The question raised by this demurrer is, whether the Plaintiff is entitled to recover for the loss of goods on a voyage from Melbourne, between the inner and the outer anchorage at Hokitika, he having paid premium only according to the rates current between Melbourne and the outer anchorage. The Plaintiff contends that he is at liberty to reject the words "sea risk only;" that there is no necessity for the receipt; that the receipt did not bind him in the terms in which it was given; that it was the act of the broker, and the broker was not authorised to do anything at variance with the policy; that these two documents amount in effect to an alteration in the policy, which, as being itself a document under seal, could only be effected by an equally solemn instrument. The answer to that, on behalf of the Defendants is, that unless the declaration of interest is accepted such as it is, there is no policy at all; that the Plaintiff must accept the declaration as a whole, and is not at liberty to reject any portion of it. And we think that must be so. It is a

declaration of sea risk, *ex necessitate*, in compliance with the terms of the policy itself; a mere declaration of the amount of merchandise shipped would, according to those terms, have been insufficient; the risk is to be paid for at current rates; and the current rates vary not merely as regards the different ports in New Zealand, but as to the anchorages at some of those ports. To enable the underwriters to ascertain what were the current rates to a particular place, they should be apprised, not merely of the amount of merchandise and the name of the ship, but the particular port in New Zealand, and the anchorage in that port, to which the vessel was to go. In the absence of such information, they would be unable to determine what were the current rates, and unable consequently to ascertain what they ought to demand as premium. They might demand a higher amount for a lesser risk, or, as in this case, a lesser amount for a higher risk. Here the Plaintiff, having paid the lesser amount, desires to have the higher risk covered. Taken as a whole, the declaration of interest covers only the lesser risk; if any words are rejected, no risk at all is covered; and, *quacunque via*, the Plaintiff must fail.

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COMPANY.

Judgment for Defendants.

MILES v. WEBER AND OTHERS.

June 30.
July 10.

ACTION for libel. Pleas.—1. Not guilty; 2. Justification. The alleged libel was contained in the following

In an action of libel by *M.*, a common school

teacher, against *W.* and others, who formed a minority of the local committee of the school, it was proved that Defendants wrote a letter to the Central Board of Education containing four charges, all calmly written, and the third in these words: "3. That a number of children's names are entered as free pupils, on the plea of pauperism, such list of names not being attested by either a magistrate or clergyman of the district; in fact the list of names is not even laid before the committee." The sting of this charge, that the Plaintiff had lent himself to allowing pupils to be placed on the free list when they ought not to have been free, was not proved. The jury gave a verdict for £30. On rule *nisi* to enter a nonsuit on the grounds that the libel was privileged, and that there was no evidence of express malice,

Held, that though this part of the letter was very small evidence of malice, it was some evidence, and enough to go to the jury and support their verdict.

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letter, addressed by the Defendants (who were a minority of the local committee of the common school at Russell's Bridge) to the Central Board of Education.

"GENTLEMEN.—We, the undersigned members of committee and parents of pupils attending the Russell's Bridge School, beg to lay before your Board the following statement:—On the 7th of April last the committee of the above school held a meeting, at which it was decided that the teacher (Mr. Miles) should be allowed one month during which to send in his resignation, and on his failing to do so he should receive the usual notice mentioned in his agreement with the school committee, viz., that at the expiration of one month he should leave the school if required to do so. At a meeting held 5th May instant, eight out of nine of the committee being present, it was decided by the casting vote of the Correspondent that Mr. Miles be not dismissed. As we differ in opinion in this matter, and also question the right of the Correspondent to a casting vote, we wish to lay the following reasons before your Board to show that it is desirable that the present teacher (Mr. Miles) be removed from the school:—1. He has, by his conduct as a promoter of discord, forfeited the confidence of the majority of parents in the district. 2. He has stated that all he cares for is to retain the minimum number of pupils necessary to secure the continuance of the Government salary—notably on a certain occasion, when he insolently invited Mr. Weber to withdraw his children from the school. 3. That a number of children's names are entered as free pupils, on the plea of pauperism, such list of names not being attested by either a magistrate or a clergyman of the district; in fact the list of names is not even laid before the committee. 4. The committee are well persuaded of the importance of a common school at Russell's Bridge, and are apprehensive that should the present school lapse for want of the necessary average attendance, to which it is plainly tending, it will be difficult to effect its resuscitation. Trusting that your Board will take this matter into your serious consideration.

"We have the honour to be," &c.

The jury gave a verdict for the Plaintiff, damages £30; but, pursuant to leave reserved by *Stawell*, C. J., a rule *nisi* was granted to enter a nonsuit on the grounds that the letter containing the libel was a privileged communication, and that there was no evidence of express malice.

Mackay shewed cause. The letter is not privileged; it is addressed to the Central Board of Education, who have got no authority in the school; the local committee appoints

the teacher, and any communication about the school should be addressed to them. There is evidence, however, of express malice. The Defendants were a minority in the Committee, and as they could not have their own way about the school, they write this letter which was proved to be untrue, to the Central Board. One of the Defendants, *Parker*, said "he would remain until he had effected the ruin of the school, and then he would resign;" and the statement in the third paragraph of the letter that the list of free pupils was not laid before the committee, was proved to be untrue. Those facts are evidence to go to the jury of personal malice. *Blackburn v. Blackburn* (g), *George v. Goddard* (h), *Harle v. Cothrell* (j), *Blagg v. Sturt* (k), *Gould v. Hulme* (l), *Jackson v. Hopperton* (m), *Wright v. Woodgate* (n), *Toogood v. Spyring* (o), *Bromage v. Prosser* (p), *Taylor v. Hawkins* (q), *Robinson v. May* (r), *Cooke v. Wildes* (s), *Gilpin v. Fowler* (t).

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Fellows for the rule. The Central Board of Education have no direct authority over the school; but they have an indirect authority over it, for they pay a portion of the public money towards the maintenance of the school; and if the Plaintiff misconducted himself, that payment would be stopped. The Board may properly be told by any one who has an interest in the school, as these Defendants had, that the schoolmaster does not possess that character which entitles him to a portion of the public money. The statement of *Parker* relied upon as evidence of express malice, is only an indication of his desire that the school should be put on a proper footing. He was personally interested in its welfare, and did not care to see it go to

- (g) 4 Bing., 408.
- (h) 2 F. & F., 689.
- (j) 14 L. T., N. S., 801.
- (k) 10 Q. B., 899; and 16 L. J., N. S., Q. B., 39.
- (l) 3 C. & P., 628.
- (m) 16 C. B., N. S., 829.

- (n) 2 Cr. M. & R., 573.
- (o) 1 *Ib.*, 181.
- (p) 4 B. & C., 255.
- (q) 16 Q. B., 308.
- (r) 2 Smith, 3.
- (s) 24 L. J., N. S., Q. B., 367.
- (t) 23 L. J., Ex., 152.

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ruin. *Harris v. Thompson* (v), *Harrison v. Bush* (w),
Somerville v. Hawkins (x), *Whitely v. Adams* (y), *Fryer*
v. Kinnesly (z).

Cur. adv. vult.

July 10.

STAWELL, C. J.:—Rule *nisi* to enter a nonsuit on the ground that the letter containing the alleged libel was a privileged communication. It was addressed by several members, being a minority of the local committee of a school, to the Central Board of Education, complaining of the mode in which the school was conducted by the Plaintiff, the then master of the school. This, it is said, was not privileged, because it was addressed to the central board, who had no direct duty or control in the matter; if any one wished to complain against the school, the communication should have been addressed to the local committee. But the persons (the present Defendants) who addressed this letter were, in fact, complaining of the proceedings of the school committee themselves. The chairman, as they contended, had improperly exercised his casting vote, converting the Defendants from a majority into a minority, and they communicated with the central board in the hope of correcting this error, and relieving themselves of this grievance by the central board stopping supplies, and thereby practically suspending the operations of the school. It is also, and we think properly, contended that this was privileged, because the central board had a duty to perform; and it was incumbent therefore upon the Plaintiff, in order to maintain the action, to prove personal malice. It is said there is no evidence in the document itself, or extrinsic to it, of such malice.

(v) 13 C. B., 333.
(w) 5 El. & Bl., 344.
(x) 10 C. B., 583.

(y) 15 C. B., N. S., 392.
(z) *Ib.*, 422.

There was an expression by one Defendant, a member of the local committee, that he would continue on until he had destroyed or ruined the school. But though, apparently, this afforded some evidence to go to the jury of personal malice, it was the statement, the Defendants urged, of a person smarting under a feeling that the school in which he was interested was being injured. It did not shew any personal malice to the Plaintiff, and expressed a strong desire to have the school, which certainly was not flourishing in the manner in which it had been, put in a proper condition. We do not think it necessary to rest our decision on this point, because on examination of the letter itself we think there is some evidence to go to the jury, contained in the third paragraph. Generally speaking, the communication appears to have been couched in very calm and temperate language, but the third grievance, so to speak, is a complaint that a number of children's names are entered as free pupils on the plea of pauperism, such list of names not being attested by either a magistrate or a clergyman of the district, and, in fact, that the list of names was not even laid before the committee. According to the evidence that was not strictly so. The names were not laid before the committee, but there was no evidence that the Plaintiff himself had ever sanctioned the names of children being entered as paupers without being attested. There was an endeavour to shew that one person had been entered, but that was unsuccessful. The sting of this portion of the libel—that the Plaintiff had lent himself to allowing pupils to be placed on the free-list when they ought not to have been free, and thus defrauding the Government, for that is what it amounts to—was not proved, and we think it was competent for the jury to take that as evidence of personal malice. It is a very small ground of malice certainly, but we think it is evidence that ought to go to the jury; and although there is strong proof that the school was not flourishing, as it had been previously, and that the Defend-

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ants were actuated by a laudable desire to restore it to its former position, still there is that amount of evidence, and we cannot destroy it. The rule therefore will be discharged.

Rule discharged.

June 30.
 July 10.

MORGANTI v. BULL.

Buzzini and others sued *Giovanni* and others in a Warden's Court for a mining encroachment, and obtained an order for £128 and £22 costs. Execution was issued against the mining claim of *Giovanni* and others, and also against the private property of each partner, and under this execution a levy was made on the private property of *Morganti*, a partner. An

ACTION for money had and received, and money found to be due on accounts stated. Pleas: Never indebted, and payment.

In March, 1867, *Maurizie Morganti*, the Plaintiff, was one of a number of Defendants (*Giovanni* and party) in the Warden's Court at Daylesford, in a proceeding brought against them by *Buzzini* and others for an encroachment on a mining claim. The case was heard on 9th March, 1867, by the Warden, Captain *Bull*, the present Defendant, who made an order in favour of *Buzzini* and party for £128 and £22 costs. Against this decision, *Giovanni* and party, on the 11th March gave notice of appeal to the Court of Mines: *Buzzini* and party on the same day issued execution against the mine of the then Defendants, and against the Defendants individually. Under this execution a bailiff seized the mine of *Giovanni* and party, and some property of *Morganti's*. In order to get rid of appeal was lodged, and *Morganti*, to free his property, paid into Court £150, and obtained a receipt as follows: "*Buzzini* and others v. *Giovanni* and others.—In the Warden's Court, Daylesford, 16th March, 1867. Received from *Maurizie Morganti* the sum of one hundred and fifty pounds for Plaintiffs' damages and costs. Chas. G. Robertson, W.C." On this payment the execution was withdrawn. The appeal was allowed as to *Morganti*, and dismissed as to the others. The Warden made an order for payment of the £150 to the Complainants, which was paid accordingly. *Morganti* sued the Warden for the £150. and on the trial it was left doubtful in what form the Warden's order was made, under which the £150 was paid into Court. There was a verdict for Defendant, with leave to Plaintiff to move to enter the verdict for himself. On rule *nisi*, Held, that Plaintiff could not succeed, and rule *nisi* discharged.

the execution on his own premises, *Morganti*, accompanied by his solicitor, went to the Warden's clerk and, as alleged under an order by the Warden for stay of the execution upon payment into court of the amount of the debt and costs "to abide the event of the appeal," paid to the Warden's clerk £150, for which he got the following receipt:

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"BUZZINI AND OTHERS v. GIOVANNI AND OTHERS.

"In the Warden's Court, Daylesford,
"16th March, 1867.

"Received from *Maurizio Morganti* the sum of one hundred and fifty pounds for Plaintiffs' damages and costs.

"CHAS. G. ROBERTSON, W.C."

Upon this payment the execution was withdrawn, both from the mine of *Giovanni* and party and from *Morganti's* individual property. The appeal was heard in the Court of Mines and was allowed as to *Morganti*, but dismissed as to all the other Defendants. On 13th November, 1867, the Warden made an order for payment of the £150 out of court to *Buzzini* and party, which was paid out to them accordingly. *Morganti*, alleging that the Warden had no power to pay the money to any one but him, brought this action. At the trial a verdict was entered for the Defendant, leave being reserved to enter a verdict for Plaintiff on the grounds: 1st, That the event to abide which the money was deposited, was decided in favour of Plaintiff; 2nd, That the event to abide which the money was deposited, became impossible to happen.

Webb and *McFarland* shewed cause against the rule.— There is no privity of contract between the Plaintiff and the Defendant individually, and money had and received will not lie. The money was paid in on behalf of all the Defendants in the Warden's Court, and they must all join in an action for its recovery. The fact of its having been *Morganti's* money does not give him a right individually to sue for it. *Bluck v. Siddaway* (a). *Giovanni*

(a) 15 L. J., N. S., Q. B., 359.

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and party got the benefit of the payment by having the execution against the mine withdrawn, and *Buzzini* and party cannot now be placed in the same position as when in possession of the mine under the execution, as it may be now wholly valueless. The money was paid in to abide the appeal. There was only one appeal, and that was decided in favour of the Complainants.

Fellows in support of the rule.—This money was paid in to abide a double event, and both events must happen before the money could be paid to *Buzzini*. It was necessary not only that *Buzzini* and party should succeed, but that they should succeed against all the Defendants. If *Morganti* had not paid the money into court, but had allowed the execution against his property to proceed, he would have been entitled on the decision of the appeal to be placed in the same position as if the Warden had decided in his favour; and would have been entitled to have his property restored to him.

Cur. adv. vult.

July 10.

STAWELL C. J.—In this case a suit was instituted in the Warden's Court, at Daylesford, between *Buzzini* and others, and *Giovanni* and others, the present Plaintiff, being one of the Defendants. The action so far as we can gather, was trespass for encroachment upon a mine. The decision of the Warden was unfavourable to the then Defendants; execution was issued against them; the mine was seized upon, and certain cattle belonging to *Morganti* the present Plaintiff, who appears to have been the only moneyed man among the Defendants, were also seized and about to be sold. While the execution was in that state, *Morganti* and his attorney paid £150 to the Warden's clerk. The 219th section of the "*Mining Statute*," provides for a state of things similar to those in the present

case, and enables the Warden to make an order for an injunction, or for payment of the money into court, or for a receiver or otherwise for a stay of proceedings on such terms as he thinks proper. It is to be presumed that some order under that section was made, though it was not produced at the trial, and could not be found. The Warden's clerk had been removed to another district, and in the change of officers there was some confusion among the papers. A receipt for £150 by the Warden's clerk was, however, produced, and the Plaintiff contended that that receipt must have been given upon the order of the Warden. We think that, so far as the non-production of the order is concerned, the receipt must be regarded as sufficient. We think, however, that the action cannot be sustained. The present Plaintiff was one of several Defendants, but if he wished to do so, he might, under the 219th section, have obtained an order which practically would have made the appeal one by himself alone. The present Plaintiff might have been restrained in such a way that the appeal would have been by himself, and not by himself and the other Defendants. He alone would have conducted it, and then no dispute could have occurred about the payment of this sum of money. The Plaintiff urges this was a matter of contract, and we agree with him; but the question is, what was the nature of the contract, in what event was this money to be due to him? He contends that the event was that the Plaintiffs before the Warden should succeed, not merely in the appeal, but against all the Defendants, and as they did not succeed against him (*Morganti*) they did not succeed so as to entitle them to the £150. We think that to hold that view would be to give *Morganti* all the advantages which he might have obtained from an order by the Warden, which it is possible may have existed, but of which we have no proof. Judging by the receipt we must presume that the order of the Warden was in the common and ordinary, not in the peculiar, form to which I have alluded. It is suggested that, as it was *Morganti* who

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paid the money, we are to presume that the appeal was by him, and by him alone. We think not. The fair inference from the receipt is, that he and the other Defendants went together to take common luck, so to speak, in the appeal; and if the then Plaintiffs succeeded against any one of the Defendants they were entitled to the money. Looking at the justice of the matter, the present Plaintiff stood between the then Plaintiffs and the levy. They were in possession of the mining claim, which might or might not have been sufficient to satisfy the amount, but which they might have sold. They gave up possession of the mine, and what became of it afterwards we do not know. We entertain no doubt that no special order was made; that it was an order in the common form; and therefore, if the Plaintiffs succeeded against any-one Defendant, they were entitled to be placed in the same position as if the levy had gone on. It was a levy, not against all, but against all or any of them. The rule to enter a verdict for Plaintiff will be discharged.

Rule discharged.

REGINA v. ROGERS.

July 8, 10.

A decree made by the Judge of the Court of Mines at Ballarat, was varied on appeal by the

Chief Judge of Courts of Mines. Subsequently the decree was quashed by *certiorari*, but not the order varying it. The Judge of the Court of Mines declined to proceed further with the case, on the ground that the order of the Chief Judge was final, and had not been quashed.

Held, that the decree having been quashed, the order varying it fell with it, and *mandamus* granted to the Judge of the Court of Mines to hear the cause.

The Court is bound to grant a *mandamus*, when satisfied that there will be a failure of justice unless it is granted.

The suit in the Court of Mines at Ballarat was instituted to restrain an encroachment by the Working Miners' Company on the Prince of Wales Company's claim, and for an account of gold previously removed. The Judge, on the 27th July, 1868, made a decree in Plaintiffs' favour, and directed accounts to be taken. On appeal to the Chief Judge of the Court of Mines this decree was affirmed, with some slight alterations. The accounts were subsequently taken, and Defendants were directed by the District Judge to pay Plaintiffs £6,842 14s. Defendants afterwards applied for and obtained a writ of *certiorari*, by which the proceedings in the Court of Mines were removed into the Supreme Court, and the decree of the 27th July, 1868, was quashed; the other papers being at the same time returned to the Judge of the Court of Mines at Ballarat. When the suit again came before him he refused to proceed with it, on the ground that the decision of the Chief Judge which, by sec. 173 of the "*Mining Statute*," was made final, had not been quashed; and that until that decision was quashed or set aside, he had no jurisdiction in the matter.

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J. W. Stephen, Fellows, and Webb shewed cause.—No precedent can be shewn for an application like the present. There has been no *procedendo* issued in this case: *Reg. v. Neville (b)*, *Reg. v. Kenworthy (c)*, and the answer to the *mandamus* may be that the case has been heard, and that the decision of the Chief Judge is conclusive.

Billing, Bunny, and Holroyd for the rule.—The decree of the Chief Judge fell with the original decree, which has been quashed; all the proceedings prior to that decree would stand, but those since it, including the decree of the Chief Judge, are dependent on that decree which has been pronounced bad, and fall with it. The present suit was a good one up to the point at which the

(b) 2 B. & Ad., 299.

(c) 1 B. & C., 711.

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decree of the Judge of the Court of Mines was quashed, and the Judge ought now to proceed as if that decree had never been made. The Plaintiffs can do nothing till this suit is settled in some manner, for it can be pleaded to any new suit instituted by them against the Defendants.

Our. adv. vult.

STAWELL, C. J.—A rule *nisi* was obtained in this case for a *mandamus* to compel the Judge of the Court of Mines to proceed with the hearing of a cause then pending before him. On the 27th July, 1868, a decree was pronounced by him in favour of the present applicants, and on the 7th December following a rule was made absolute by this Court for a writ of *certiorari* to quash that decree, on the ground that it was made in contravention of the provisions of the "*Mining Statute*." On the cause being again set down by the present applicants to be re-heard, objection was taken that the Court had not jurisdiction to hear it—that it had been heard already—and that objection was entertained. In consequence, the present rule was applied for and obtained. The applicants contend, that unless this rule is made absolute, they are practically without remedy; a decree was pronounced in their favour; their rights were recognised, and the Defendants could not dispute them; but unless this suit was allowed to proceed, they could do nothing, that they could not proceed *de novo*, for there was this suit as a *lis pendens* which it was impossible to get over. It was nominally a plea in abatement, but, inasmuch as the *lis* could not be advanced further, it would practically be a plea in bar, and that they would therefore be without any redress whatever; without this writ their rights could not be enforced; it is a prerogative writ in advancement of justice, and although they could not find a precedent for its issue, under circumstances similar to the present, there would otherwise be a failure of justice which ought not to be allowed.

The Defendants did not offer to us any suggestion of any other mode by which the applicants could obtain redress, but relied on the fact that there was no precedent whatever. This is no doubt an extraordinary case, but it arises from the peculiar circumstances of this country, consequent upon the discovery of gold, the mode in which the working is conducted, and the intricate nature of the contests arising between persons who are carrying on apparently a very simple operation, but who yet, in reality, are embarked in partnership transactions, which require the intervention of courts of equity to arrange between them in the event of disputes. The Defendants also suggested, in opposition to the rule, that certain proceedings had taken place between the decree pronounced and the quashing of that decree, and that until those proceedings had been completely removed the Court could not go further. We think the proper answer to that objection is, that what took place between the pronouncing of the decree and the quashing of it, was all dependent upon the decree, and must go when the decree itself is quashed. The decree is the foundation of the subsequent proceedings, and the foundation being removed, the superstructure necessarily falls with it. We think the reasons assigned by the applicants, although no precedent has been shewn, are sufficient to justify us on general principles in making the rule absolute. This Court is bound to grant this prerogative writ when we are satisfied that there will be a failure of justice unless it is granted. We think the rule for a *mandamus* should go.

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Rule absolute for mandamus.

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July 5, 10.

HANCOCK AND ANOTHER v. EMMETT.

H. and others, in 1863, obtained a judgment in the County Court at Melbourne against *E.*, but issued no execution. In May, 1869, they obtained from the clerk of the court a certificate that the judgment was still in existence unsatisfied, and that £31 14s. was still due on it. On this certificate, they signed judgment in the Supreme Court, and issued execution. *E.* obtained a rule *nisi* to set aside the execution as a practical evasion of clause 40 of the rules of the County Court, against issuing executions on stale judgments, without order first made on summons to shew cause.

Held, that so long as the certificate stood, the judgment was right, and rule *nisi* discharged.

RULE *nisi* to set aside a judgment and execution and subsequent proceedings in this cause, on the ground that the execution was issued after the expiration of one year from the day on which judgment was signed by Plaintiffs against Defendant.

On 23rd March, 1863, Plaintiffs obtained a judgment in the County Court, Melbourne, against *E. N. Emmett*, the Defendant, but no execution was then issued. On 23rd May, 1869, the Clerk of the Court granted to the Plaintiffs the following certificate:—"This is to certify that at the County Court at Melbourne, on 23rd March, 1863, *Joseph Gibbs Duffett* and *Theodore Hancock* obtained a judgment against *Edward N. Emmett*, for the sum of £31 14s., and that the whole of the said sum is still due upon the said judgment. And I do further certify that the sum of 10s. has been paid into the said County Court for this my certificate." Acting under this certificate, Plaintiffs, on 23rd May, 1869, signed judgment against Defendant in the Supreme Court, and issued execution against him under 28 *Vic.*, No. 261, sec. 262. Defendant sought to set aside the execution on the ground that before it was taken out the leave of the Judge of the County Court should have been obtained on a summons to shew cause as required by clause 40 of the rules of that Court. That regulation provided that "no execution shall be issued after the expiration of one year from the day of trial, or the time, if any, limited for payment of the sum recovered, except on a summons to shew cause." It was urged on behalf of Defendant that unless effect was given to this rule suits might be revived by executions issued after the lapse of fifty years, and power

would thus be conferred on the County Court which the Supreme Court could not exercise. For the Plaintiffs, on the other hand, it was submitted that the rule applied wholly to the practice in the County Court, and not to judgments removed to the Supreme Court.

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Wrixon for Plaintiffs.

Dobson for Defendant.

Our. adv. vult.

STAWELL, C. J.—Rule *nisi* to set aside a judgment in this Court, execution upon it, and all subsequent proceedings. There was a judgment of old date in the County Court, signed more than six years ago, and according to the affidavit no steps had been taken to revive it in the manner prescribed by the rules of that Court. It is urged that irreparable injury will arise if such a judgment is allowed to be transferred from the County Court to this Court, without the requirements of those rules being complied with. The 62nd section of the Act directs that execution may issue in the Supreme Court upon any judgment in the County Court, on the clerk granting a certificate in the form in the 8th schedule. That certificate is that a judgment has been obtained in the Court, is still in existence, is for a certain amount, and that the amount is unpaid and still due. If we required any more we should add terms beyond those which the Legislature prescribed. If the Defendant is aggrieved he may apply to the County Court to correct the judgment, and if an incorrect certificate has been issued, it will necessarily go, and the judgment signed upon that certificate will go with it; or if there is any inaccuracy it may be set right. But we are not at liberty to import into the certificate, matter which the Legislature did not prescribe, simply because it is suggested or hardship may arise. The rule will be discharged.

July 10.

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July 6, 10.

Though the execution of a writ of *ca. sa.* is now by law prohibited, except under certain circumstances; the issue of such a writ is not prohibited.

Judgment was signed against a defendant after he became insolvent. Within a week after the official-assignee heard that judgment was signed, he applied to have it set aside.

Held, that the application was made within a reasonable time, and judgment set aside.

RULE *nisi* to set aside an order made by *Williams, J.* in chambers. The action was one of debt; the Defendant was arrested on a *ca. re.*, and held to bail. He gave bail to the sheriff, and also put in recognisances. The case was referred to arbitration, and an award made in favour of the Plaintiff. A verdict was entered in the action, but the Defendant, on the 21st August, sequestrated his estate. On the 31st August, judgment was signed, and a writ of *ca. sa.* issued. The official assignee then applied to Mr. Justice *Williams* to set aside the judgment and execution, but his Honour set aside the writ of *ca. sa.*, and allowed the judgment to stand, in order to fix the Defendant's sureties. The case now came before the Court upon two rules *nisi*, one obtained by the Plaintiff to rescind that part of the order setting aside the execution; and the other by the official-assignee to rescind that part of the order refusing to set aside the judgment. It appeared by affidavit that the first application had been made within a week after the official-assignee became aware of judgment having been issued.

Fellows for Plaintiff.

Williams for the Assignee.

The authorities cited were 7 *Vic.*, No. 19, secs. 26, 27, 28, 29; 10 *Vic.*, No. 7, secs. 1 and 3; the *Common Law Procedure Act*, secs. 280, 292, 296, 336; *Macandrew v. Ibbotson* (d), *Frith v. Wollaston* (e), *Alcock v. Sutcliffe* (f), *Hunt v. Cox* (g), *Arch.* 837, *The Imperial Act*, 1 and 2 *Vic.*, cap. cx., secs. 90 and 91; *The Colonial Insolvency Statute*, sec. 37; *Spencer v. Demett* (h), *Phillips v. Welsby* (j), *Bot-*

(d) Sup. Ct., *Vic.*, 7th Dec., 1860.

(e) 7 *Ex.*, 194.

(f) 1 S. & C., B. C., Rep., 313.

(g) 3 *Bur.*, 396.

(h) L. R., 1 *Ex.*, 123.

(j) 1 *Dowl.*, P. C., 9.

tomley v. Medhurst and Penny (k), *Anon v. Bruce* (l),
Archer v. Haile (m), *Thackeray v. Harris* (n), *Ewart v.*
Jones (o), 1 *Chitty's Practice*, 88; 2 *Wms. Saund.*, 72.

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Cur. adv. vult.

STAWELL, C. J.—This is a rule to set aside a portion of an order made by a Judge in chambers. When the rule nisi was granted, leave was reserved to the Plaintiff to move to set the other portion of the order aside. The order was one setting aside a writ of *capias ad satisfaciendum*, issued upon a judgment signed against the Defendant, but refusing to set aside the judgment on which the *capias* had been issued. The Plaintiff wished to have the writ of *capias* restored; and it was desired, on the other hand, to have the judgment set aside, so that practically there were two rules. Taking the former first, it was urged, and we think successfully, that the history of legislation, as well as the authorities on the subject, shews that though the execution of a writ of *capias ad satisfaciendum* is prohibited save under certain exceptional circumstances, the issue of a writ of *capias ad satisfaciendum* is not prohibited. Therefore, though the execution might have been stayed or set aside, the actual issue of the writ was not stopped. There is a doubtful expression in one of the former acts, but the whole of them are now consolidated under the "*Imprisonment for Debt Act*," and it is there provided that "no person shall be arrested under a writ of *capias ad satisfaciendum* unless as hereafter provided." That language, however, does not prevent the issue of the writ; it rather contemplates its issue. We have been referred to an Act much more strongly worded than the present—the Irish *Bankruptcy Act*, where the writ is prohibited, and yet it was held that the writ could be issued. *Ewart v. Jones*. If the case

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(k) *McClell.*, 398.

(l) 2 *Ch. Re.*, 106.

(m) 1 *M. & P.*, 285.

(n) 1 *B. & Ald.*, 212.

(o) 14 *M. & W.*, 774.

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rested there, therefore, we would allow the writ of *capias ad satisfaciendum* to be restored; but, inasmuch as it rests upon the judgment, we must consider whether the latter can be allowed to stand. The judgment was signed against the Defendant after he became insolvent, and it is almost conceded that such a judgment might have been set aside. But it is said that the present applicant, the official-assignee of the Defendant, has been guilty of *laches*; that the official-assignee can be in no better position than the Defendant himself would have been in, and that he did not make this application within proper time. Although the books take it for granted that an application of this kind should be made within four days of the date of the judgment, yet, from the decisions, it appears it may be made within a reasonable time. It is impossible to lay down a general rule on the subject, we must deal with the particular circumstances of each case as it arises. The present application was made within a week after the assignee heard that judgment was signed, and we cannot say that that was an unreasonable time. The judgment was signed at a time when, by the "*Insolvent Act*," all proceedings were suspended; it was signed after the insolvency, and therefore improperly signed, and might be set aside on application. The course pursued in this instance only practically follows out the suggestion of *Martin B.* in the case of *Frith v. Wollaston*. There a judgment was signed before insolvency, but the execution was issued after insolvency, and *Martin B.* suggests that the proper course to be pursued would be to apply to stay proceedings. It is impossible to stay proceedings here, for the state of things is different. But the course pursued is analogous to a stay of proceedings. The rule will, therefore, be absolute to rescind that part of the order refusing to set aside the judgment. The judgment will go, and of course the *capias* falls with it. It is unnecessary to refer to the summons from chambers, as the decision on the other point governs it in the present state of the proceedings. No costs to either side.

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June 24, 25.

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SPECIAL case reserved by *Williams, J.*, on the trial of *Hugo Levinger*, at the Criminal Sessions, for the murder of a native of the Island of Palmar, in the South Seas, in October, 1868. The case was allowed to go to the jury as one either of murder or manslaughter. Prisoner was convicted of manslaughter, but the point reserved was whether there was evidence on the Judge's notes to go to the jury to sustain the charge of manslaughter.

G. P. Smith, A. G., Dunne, and Adamson, for the Crown.

Ireland, Q.C., and *Fellows* for the prisoner.

The facts appear fully in the respective judgments of their Honors the Judges. The authorities cited were:—For the prisoner—*Reg. v. Lopez (p)*, *Reg. v. Taylor (q)*, *Rosc. Cr. Law*, 173; *Woolrych, Cr. Law*, 82. For the Crown—*Reg. v. Edmeads (r)*, *Reg. v. Turner (s)*, *Reg. v. Whitehorn (t)*, *The Coalheaver's Case (v)*.

Our. adv. vult.

the crew, in the presence of the cook, "Shoot if you can get a good shot at them," or "Fire down on them, and take good aim." About twenty minutes afterwards, and when the disturbance had to a great extent ceased, the cook held a light into the hold in which the Palmar natives then were, and three of the crew who had previously received muskets, neither of them being *Louis*, guided by the light, shot the Palmar natives dead. There was no evidence that the cook ever communicated to either of these three, the order *L.* had previously given to *Louis*. *L.* was tried for murder, and found guilty of manslaughter. On special case reserved,

Held, per *Stawell, C. J.*, and *Barry, J.*, that it was for the jury to decide on the nature of the orders given; and to consider whether, during the interval between their delivery and the discharge of the last shot, circumstances had so changed, or so long a time elapsed, as to justify the conclusion that those orders had been virtually, though not expressly, withdrawn; and that their verdict ought not to be disturbed.

Per *Williams, J.*, *dissentiente*, there was no evidence to go to the jury, and the prisoner should be discharged.

(p) 1 Den. & B., 525.

(q) *Ib.*, 288.

(r) 3 C. & P., 390.

(s) 4 F. & F., 339.

(t) 3 C. & P., 394.

(v) 1 Leach Cr. Law, 64.

L. was supercargo of a ship conveying natives of Tanna, Palmar, and other islands in the South Seas, to be employed as labourers in the Fijis. A quarrel arose on board, between the Tanna and Palmar natives, and a serious disturbance occurred; the Palmar natives shooting with bows and arrows at the Tanna natives, and the crew. Muskets were given to the crew in the presence of *L.*, who said to *Louis*, one of

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WILLIAMS, J., now read his judgment (differing from that of the other members of the Court), as follows:—

On the 11th August, 1868, the British ship called the "Young Australian," schooner, of about 130 tons register, sailing under the English flag, left Sydney for Fiji, with a small miscellaneous cargo; the prisoner *Levinger* being the supercargo. The crew consisted of about ten, of which four were Rotumah men, and one a native of Erromanga. In about fourteen days Levuka was reached, and cargo and passengers landed. Sailing by Tariona, where yams and ballast were taken in, the ship anchored at Rotumah, and the four Rotumah men on board went on shore and six or seven natives of Rotumah shipped in their stead. The ship then sailed to Tanna, one of the New Hebrides, and took in thirty men desirous of hiring with the planters in the Fijis. At Erromanga ten or eleven natives were shipped, and from thence the vessel proceeded to other islands for the same purpose, and about the middle of October anchored off Palmar, about a mile from the shore. The "Young Australian" stopped at Palmar about seven or eight days, having on board some seventy natives. At the various islands it was customary for two boats to leave the ship in search of natives, the crew being armed with muskets, but no evidence was adduced as to any threat being used or violence had against the natives on any occasion; in fact, it invariably shows a perfect willingness on their part to embark, and freedom on board after embarkation. No doubt the ship was employed in procuring labour from the Hebrides to market with at the Fijis, but it would seem after an apprenticeship of three years they returned to their own country with the proceeds of their labour; and that the English consul at Levuka supervised their agreements with the planters. No force was used, and the traffic appeared to be openly carried on—certainly, I can find no fact which would justify the conclusion that the "Young Australian" was engaged in a kidnapping expe-

dition. The ship cleared out in the customary way from Sydney. The English consul at Levuka inspected the natives on their arrival, and made the bargain on their behalf with their employers. During the voyage the natives were permitted perfect liberty on board the ship, and never appeared restive or unhappy—never attempted to escape or commit any act of violence whatever; so I cannot discover aught upon my notes to justify the conclusion that those on board were engaged in a common illegal purpose—the kidnapping of the natives.

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The ship arrived at Palmar about ten a.m., and immediately two boats left the ship armed as usual—*Rangi*, the Erromanga man, in command of one, and *Bob*, the second mate, in command of the other. The boats returned about two, with two natives in the big and one native in the small boat—one aged 45, another 25, and the other about 22. When the boats arrived *Levinger* was on deck, and as they came up a side-ladder one of the boatmen helped them up, motioning to the Palmar men to give their hands to those on deck, and so they leaped upon the poop; no menace or violence was used. The three Palmar men sat on the poop for an hour and a half, and had some calico given them to tie round their loins. At this time *Levinger* was frequently on the poop, and no doubt the calico was supplied by his command. Many Tanna men were on the poop likewise, and as the two boats shoved off again for shore the Tanna men showed the Palmar men where they were to go down, and the three went down the main hatch accordingly, descending by means of a piece of wood with notches in it, which served as rude steps. Up to this time, about three or four o'clock, nothing had occurred to disturb the harmony of the ship, but, unfortunately, in the main hold there were ten or fifteen Tanna men, and when the Palmar men descended a quarrel ensued, the Tanna men throwing cocoanuts and billets of wood at the Palmar men. Very soon the Tanna men came flying up from the

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hold, with sticks and stones after them, crying out, "Fight! fight!" After the Tanna men had reached the deck, the Palmar men were about to follow, when the prisoner pushed them back, and the hatches were put on. These were, however, quickly forced off by the Palmar men below, who, having found a number of bows and arrows, which the Tanna men had brought on board at Tanna for barter in the Fijis, commenced shooting and sent the arrows flying out of the hold in all directions. At this time *Levinger* was on the port side of the galley, about fifteen feet from the main hatch, and the two boats had just returned to the ship. *Levinger* was heard to say, as the crew came on board from the boats, and as *Antonio* was preparing a rope, "It is of no use getting a rope to make them fast now; they have bows and arrows." At this time *Bob* had two muskets in his hand, *Rangi* had one, *Louis* one, *Antonio* one, and *Erromanga Tom* one. The muskets were given to the men before the mast just where *Levinger* was standing. The captain was on the poop. *Louis* went down the fore-castle; he came up, spoke to prisoner, got another musket, and went down the fore-castle again. Prisoner said "Shoot if you can get a good shot at them." This is according to the boy *Johnson's* evidence. According to the cook's evidence, *Louis* went down into the fore-castle. Prisoner said he was to fire down at them, and take good aim. Both witnesses are speaking of the same time, namely, when *Louis* went down into the fore-castle. In fact, all through the evidence, discrepancies arise. Those in a state of terror cannot afterwards speak to facts and conversations so clearly as one might wish; but I have no doubt that the prisoner did not speak twice, but only once, as *Louis* was descending to the fore-castle. Now this order to *Louis*, the cook heard, and also the boy *Johnson*. At this time the ship was all commotion; arrows were flying about—some of the crew were wounded—the captain had in vain hoisted a green bush, the emblem of peace—the Palmar men only shot at it. The Palmar men no doubt thought, savages as

they were, that their lives were sought by the Tanna men, and they determined to sell their own as dearly as they might. The terror of the crew is evinced by what *Louis* and *Antonio* afterwards cried out when they went down into the hold—"No use being frightened now, they are dead." It is at this juncture that the prisoner tells *Louis* to shoot, if he can get a good aim. Had *Louis's* shot taken effect the case might then have been left to the jury, either as manslaughter or justifiable homicide, but certainly not as murder.

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Did the circumstances justify the taking away of life, or was greater violence used than necessary under the circumstances? The men were under fire; as the chief mate expressed himself, "We were under fire equally as bad as musket fire." One of the men was shot in the breast, another in the eye. The confusion was great on board, and it may be at this precise moment the crew were perfectly justified in defending themselves, and in preventing perhaps greater bloodshed, by putting a stop to the fight before the night came on. It does not appear, however, that *Louis* did shoot then, perhaps for the reason he could not get a good aim, and shortly afterwards the commotion began to subside. The arrows flew at greater intervals, and eventually ceased altogether. Twenty minutes after *Levinger* had spoken to *Louis*, and when the ship was comparatively quiet—when in fact the whole aspect of the ship had changed from war to peace—when *Levinger* was away on the poop in no way countenancing the firing, *Rangi*, *Erromanga Tom*, and *Antonio* fired most wantonly and deliberately at the Palmar men, who were hiding themselves behind the yams in the forehold. The three shots took effect, and the three Palmar men were shot dead. Now, there is not a particle of evidence as to *Rangi*, *Erromanga Tom*, or *Antonio* being present, or within hearing, or within sight, when *Levinger* told *Louis* to shoot if he could get a good aim. As the three sailors fired at the three

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Palmar men down the forehold, the cook, *Henry Heath*, held a light, so as to enable them to ascertain the whereabouts of the men, in order that they might fire with effect. It does not appear the cook ever communicated to *Rangi*, *Tom*, or *Antonio*, the order *Levinger* gave to *Louis*—no evidence that the cook ever spoke to them at all. But because the cook, twenty minutes before, heard the order given to *Louis* by the prisoner, under different circumstances, is he to be considered as acting upon what he then heard, and making *Levinger* responsible for his acts? In fine, the cook, it is said, was aiding and abetting *Tom*, *Antonio*, and *Rangi* in the murder, while *Levinger* was aiding and abetting the cook; or the argument might be that *Levinger* was aiding and abetting the three through the medium of the cook; and yet, in fact, had *Louis* acted on the instructions of *Levinger*, and shot one of the Palmar men, *Levinger* could only have been found guilty of the crime of manslaughter, or not guilty, according to the view the jury might entertain; but through the medium of the cook the jury would have been well warranted in finding the prisoner guilty of murder.

As to the order to *Louis* being a continuing order, *Levinger* was merely supercargo; he had no authority in the ship; had no power over the sailors; could not command them to do this, that, or the other. His care was the cargo; the captain's the ship. The order which he gave to *Louis* was a mere personal matter, making him responsible for the act of the agent he puts in motion, but cannot be treated as an order in the government of the ship, which, if acted on by others without revocation, could make the supercargo responsible. How, then, can *Levinger* be said to have been present either actually or constructively at the time the crime was committed? He was away from the scene as far as the ship would permit, namely, on the poop—he was not in authority—had no power over the actors, and it is difficult to ascertain on what principle the

guilty act of the three is to be fixed, and considered as the joint act of *Levinger*. *White and Richardson's Case* (w). No doubt if *Levinger* can be held to have taken a part in the crime charged, even constructively, he may be found guilty as a principal; but if the crime was not commenced when *Levinger* left the forehold for the poop, and did not commence for some time after, it would appear, if guilty at all, he would be guilty as an accessory before the fact—the crime being murder. He was as much absent as the limits of the ship would permit, and certainly was not answerable for countenancing the death by his presence, and would seem to be only answerable to the law, in having moved and incited the crew to commit the crime in question some time before the crime was committed. I think there was no evidence to go to the jury, and that the prisoner should be discharged.

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The judgment of STAWELL, C. J., and BARRY, J., was also read by *Williams*, J., as follows :—

We regret, especially in a case like the present, that after full consideration of the evidence, we are unable to arrive at the same conclusion our colleague has done, before whom the trial was had, and who enjoyed the advantage of hearing the testimony given by the witnesses themselves. The question referred to the Court cannot, however, be very materially affected by the mode or manner of those witnesses. It is simply whether there is any evidence on the judge's notes to justify the finding of the jury. The prisoner, charged with murder, was found guilty of manslaughter. He was supercargo; the freight consisted principally of natives, for they were so treated, and not as passengers, taken from the isles of Tanna, Palmar, and others adjacent; they were conveyed as labourers, to be employed

(w) R. & R., 101.

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by the planters of the Fiji Islands. The prisoner was specially interested in their safe preservation. Apart from the position he occupied, his observation on the death of one who had apparently pined away, "Here will be a loss of £5 10s.," shewed the interest he took in their well-being. Immediately on the quarrel between the Tanna and Palmar natives, and consequent disturbance, taking place, he assisted in compelling the Palmar natives to return to the hold. After it had commenced he said to a person preparing a rope, "Its no use getting a rope to make them fast now; they have bows and arrows." On the outbreak becoming serious he was present, close at hand, when muskets were given to the crew, and soon afterwards he himself issued directions, of which there are two versions—one "Shoot if you can get a good shot at them," addressed, apparently, to one of the crew who had received a musket, gone down the forecastle, come up, spoken to the prisoner, and got another musket: the other version was thus related, "They were to fire down on them, and take good aim."

It is unnecessary to consider the words attributed to the captain of the vessel; they merely add a third view to the other two, of whether the death of these natives was caused by persons acting by the directions of the accused, or on their own motion, or, thirdly, by the orders of the captain. The directions given by the prisoner were heard by the cook and the cabin-boy. The person addressed went down the forecastle, and in a short time there was the report of a gun, apparently from thence. About twenty minutes after the order had been given, the cook held a light down the main hatch into the hold in which these Palmar natives then were, and three of the crew, who had previously received muskets (none of them being the person addressed by the prisoner), guided by the light thus held, fired down the main hatch into the hold, and shot the Palmar natives. They were brought up—two of them dead, and the third

dying. At least seven shots were fired, one of the three natives receiving five wounds.

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The history of the case may be briefly put thus:—A disturbance arose in consequence of a quarrel between the natives of the two islands. The object of the prisoner and others on board was apparently at first to keep the inhabitants of each island separate, then to confine the Palmar natives to the hold, then to allow them to leave the ship, then to frighten them, then to wound them, and finally to put them to death. Had all the shots been discharged immediately after the prisoner's last directions were given, and death ensued thereon, it would have been for the jury to say whether the persons who fired acted under or in consequence of the prisoner's orders, and if so, whether the condition of things actually existing on board the ship justified those orders; or, in the absence of any or sufficient justification, made the homicide murder or manslaughter.

One of the arguments presented at the bar, though apparently not much relied on, was, that the prisoner could not be guilty of manslaughter as an accessory before the fact, inasmuch as accessories of that kind, absent at the time of the commission of the homicide, cannot exist in manslaughter. Speaking generally, we concur in the latter proposition, but in our opinion it leaves the real question undecided. The material issue of whether the prisoner was present or not, is overlooked. It was urged, that, as the prisoner was on board a ship, it was impossible for him to have withdrawn, as he might have done had the affray occurred on land, and that may have been so; but it was still for the jury to determine whether, though he did remove to the after-part of the ship, he could, so long as his orders remained not countermanded, be regarded as absent in such a sense as to preclude his being an aider and abettor. As a matter of fact, he could not have been much more than twenty feet or so further from the main hatch

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on the one occasion than on the other. There were several circumstances on which a jury alone could pronounce; the extent to which the prisoner acted with and assisted the crew; his not merely sanctioning but giving express orders to take away the lives of those who were specially under his protection; those orders, though spoken, as it was said, only to one, having been beyond all doubt heard by others, and being, as reported, capable of being understood in terms as addressed generally; those orders, too, bearing, according to one version, a construction which would make them continuing until the disturbance had been suppressed; one of those who heard him having so assisted as to be mainly instrumental in enabling the men who fired to take deadly aim, and the orders never having been in express terms countermanded—were facts from which, taken altogether, a jury were at liberty, in our opinion, legitimately to infer that the prisoner was not absent, but sufficiently near to afford assistance if required, and was an aider and abettor in the crime committed.

We think it was also for the jury, not the Court, to decide on the nature of the orders given, and that point having been determined, then to consider whether, during the interval between their delivery and the discharge of the last shot, circumstances had so changed, or so long a time elapsed, as to justify the conclusion that those orders had been virtually, though not expressly, withdrawn. The case was one which, with propriety, could only be determined by a jury, and their verdict ought not, as the evidence strikes us, to be disturbed.

Conviction affirmed.

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July 2, 15.

SPECIAL case stated by *Barry, J.*, for the opinion of the Court as follows:—

"In order to render intelligible the first set of objections taken in this case, I am forced to adopt the somewhat unusual course of setting out the second count of the information:—'Second Count.—And the said Attorney-General further informs the said Court that after the passing of the '*Amending Land Act 1865*'—to wit on the 12th day of February in the year of Our Lord 1866—the Governor of Victoria did with the advice of the Executive Council duly make under the said Act certain regulations for prescribing the form of and the conditions and mode of applying for licences to be issued under the said Act and the conditions under which the same should be issued entitling the holders thereof to reside on or adjacent to a gold-field and that in and by the said regulations it was amongst other things prescribed that one of the terms and conditions of every such licence should be as follows that is to say 'That the licensee thereof should not be permitted to assign or sublet the land to which such licence shall refer or any part thereof or to part with the possession thereof or of his interest therein without the consent of the Board of Land and Works first had and obtained' And the said Attorney-General further informs the said Court here that after the making of the said regulations and before and at the time of the committing of the offence next hereinafter mentioned it became and was the usage and course of business of the Board of Land and Works to require that every person who should desire to assign to another any land to which any such licence might refer and who should seek to obtain the consent of the said Board to such assignment should in order to the obtaining of such consent by a solemn declaration voluntarily made and declared before a justice of the peace under and in pursuance of the '*Statute of Evidence 1864*' verify and assure to the said Board that he had since the granting to him of the said licence made improvements upon such land and the value of such improvements And the said Attorney-General further informs the said Court here that after the making of the regulations hereinbefore mentioned and while the same were still in force—to wit on the 11th day of February in the year of Our Lord 1867—four several

J. M. was informed against for that fraudulently intending to obtain the consent of the Board of Land and Works to an assignment to one *C. C.* of land held by *M. M.* under licence from the Crown, he, *J. M.*, did go before a Justice of the Peace, and knowingly falsely corruptly and wilfully voluntarily make and solemnly declare the truth of a certain declaration and then and there in and by such declaration did declare, &c., whereas in truth and in fact," &c.

Held, that this declaration was one not imposed by law, but required only by usage of the Board of Land and Works; that a false declara-

tion such as this, was not made penal by any section of the "*Evidence Statute*," because it was not declared under that Act; and was not made penal under the "*Criminal Law and Practice Statute 1864*," sec. 271, because it was not declared of the truth of any fact, matter, or thing, by any law required or authorised, to be verified or otherwise assured or ascertained;" and conviction quashed.

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" licences under and in pursuance of the said Act and regulations were
 " issued by the Governor with the advice of the Executive Council
 " purporting subject to the terms and conditions set forth in the said
 " licences and in the said regulations as hereinbefore mentioned to give
 " to one named in the said licences respectively by the name of *Michael*
 " *Mungovan* full licence and authority for one year from the date of
 " the said licences as the holder of the same to reside on and cultivate
 " four several parcels of Crown land situated upon a gold-field—to
 " wit the gold-field of Gordons—and respectively described in the said
 " licences and also more particularly hereinafter And the said Attor-
 " ney-General further informs the said Court here that after the
 " issuing of the said licences—to wit on the 24th day of October in
 " the year of Our Lord 1868—at Ballarat in the said colony *John*
 " *Mungovan* fraudulently intending and designing to procure the assign-
 " ment to one *Cornelius Cunningham* of the right and interest in and
 " to the said parcels of land respectively under the said licences and
 " for that end fraudulently intending and designing to obtain in manner
 " aforesaid in that behalf the consent of the Board of Land and Works
 " to such assignment and to deceive and impose upon the said Board
 " did in pursuance of the said fraudulent intention and design go
 " before *Thomas Henry Budden* Esquire then and there being a justice
 " of the peace in and for the said colony and did then and there,
 " before the said justice knowingly falsely corruptly and wilfully
 " voluntarily make and solemnly declare the truth of a certain declara-
 " tion which he the said *John Mungovan* for the purpose aforesaid pro-
 " duced to the said justice and then and there in and by the said
 " declaration before the said justice did solemnly declare among
 " other things in substance and to the effect following that is to say—
 " That *Michael Mungovan* was then the holder of the licences numbers
 " 6,725 6,725A 6,725B 6,725C under the forty-second section of the
 " '*Amending Land Act 1865*' to occupy four several portions of land
 " being respectively of the area of nineteen acres two roods and sixteen
 " perches nineteen acres two roods and one perch nineteen acres two
 " roods and six perches nineteen acres one rood and fifteen perches
 " being in all seventy-seven acres three roods and thirty-eight perches
 " of land in the parish of Moorabool West in the county of Grant
 " part of allotment number six which said licences were and are the
 " licences issued as hereinbefore mentioned and that since the licences
 " were granted he the said *Michael Mungovan* had made improve-
 " ments on the ground held thereunder to the value of eighty pounds
 " whereas in truth and in fact the said *Michael Mungovan* had not
 " made any improvements nor had any improvements been made upon
 " the said ground of or nearly of the value of eighty pounds.'

" When the Defendant was called upon to plead, a motion was made
 " by counsel on his behalf, that this, with other counts, should be
 " quashed on the following grounds:—1. The regulations, which as
 " averred were made by the Governor-in-Council, under 27 *Fic.*, No.
 " 237, sec. 70, are *ultra vires*. 2. The licence issued under the '*Land*

"Act" is personal, and not capable of being assigned. 3. The issue of "the four licences in the court mentioned to one person is illegal, inas-
 "much as the quantity of land comprised in them exceeds in the aggre-
 "gate the quantity which the law allows one person to hold, namely, twenty
 "acres only. 4. There is no averment in this count that the state-
 "ment in the declaration, said to have been made by the Defendant,
 "was made by him with the knowledge that the statement was untrue.
 "5. Making a declaration in manner averred is not an offence within
 "the '*Land Act*,' because the regulations being, as stated above, in
 "excess of the powers conferred by the Act, the licence is illegal.
 "Wherefore, there is nothing in the '*Evidence Act*,' or in the criminal
 "law, to render the making of such a declaration contrary to law.

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"At the close of the case for the Crown, the following additional
 "objections were raised:—1. The licences proved in evidence are not
 "issued by the Governor-in-Council as required by the '*Land Act*'—
 "they are signed by *J. M. Grant*, Commissioner of Lands. 2. The
 "land included in the licence is not situate adjacent to a gold field, be-
 "ing separated from Gordon's, the nearest, by a forest three miles
 "across as the crow flies, inaccessible by carts, and five miles distant by
 "the nearest road.

"Doubts were entertained as to whether the objections, one to five
 "inclusive, could be reserved; but on the part of the Crown a consent
 "was given that, if consistent with the powers conferred by the statute,
 "the opinion of the full Court should be taken on them as well as on
 "the others. Judgment on the verdict was respited, and sentence has
 "not been pronounced. I have the honour, therefore, to submit—(1)
 "Whether any or either of the objections, one to five; (2) whether
 "either of the other objections respectively—can be sustained."

Fellows for the prisoner. It is incumbent upon the
 Crown to shew that the declaration made before the
 Justice was untrue, and also material. Sec. 37 of
 the "*Evidence Act*" (x), enacts that "any justice, notary
 public, or public officer, now by law authorised to administer
 an oath, may take and receive the declaration of any person
 voluntarily making the same before him in the form of the
 5th schedule to this Act annexed." This was not a declara-
 tion made under any power conferred by the "*Evidence*
Statute," and that statute does not attach any penalty to
 the making of a false declaration not made under any of the
 powers conferred by it. The "*Criminal Law and Practice*
Statute" (y), however, enacts, by sec. 271, that "in every
 (x) No. 197. (y) No. 233.

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case in which by any Act now or hereafter to be in force, it shall be required or authorised that facts, matters, or things be verified or otherwise assured or ascertained by or upon the oath, affirmation, declaration, or affidavit of some or any person, if any person having in any such case taken or made any oath, affirmation, or declaration, so required or authorised, shall knowingly, corruptly, and wilfully, upon such oath, affirmation, or declaration depose, swear to, or make any false statement as to such fact, matter, or things," he shall be guilty of perjury. It is necessary, therefore, before any person can be charged with perjury in having made a false declaration, to shew that the declaration was required to be made by some Act or law. The declaration in this case did not relate to any "fact, matter, or thing" in which any Act of Parliament requires a declaration.

Adamson for the Crown. The "*Evidence Act*" cannot contemplate that a voluntary declaration should be required by some Act of Parliament before perjury could be assigned upon it. No doubt such a declaration is made with some object; and this Defendant had an object, namely, to induce the Board of Land and Works to do something which but for this declaration they would not have done. The title to his land may not perhaps be a good one, but it is marketable, and the Defendant by making this declaration to assist him in selling, is guilty of perjury. The words of sec. 271 of the "*Criminal Law and Practice Act*" are sufficient to include a declaration before a justice under the "*Evidence Act*." *Reg. v. Pearce* (z).

Cur. adv. vult.

July 15.

WILLIAMS, J., read the judgment of the Court as follows:—

The count upon which the Defendant was found guilty contained averments, amongst others, to the effect that cer-

(z) 1 W. & W., L., 248.

tain regulations had been passed under the "*Amending Land Act 1865*," one of which restrained the assignment of any licence without the consent of the Board; that in order to obtain such consent, a solemn declaration should be voluntarily made before a justice of the peace, under the "*Evidence Act 1864*," that improvements had been made and their value; and then charged that the Defendant had knowingly, falsely, &c., made such a declaration. Various objections were raised to the conviction, amongst others, that a licence issued under the 42nd section of the "*Amending Land Act*" was not assignable; that not more than one such licence could be issued at the same time to any one person, and that these prefatory averments could not be rejected from the information, as the only voluntary declarations on which perjury could be assigned were those respecting facts, matters or things required or authorised by any law as provided by the "*Criminal Law and Practice Statute 1864*," sec. 271. As the making a voluntary declaration respecting the facts which form the subject-matter of this prosecution has not been required by any Act of Parliament, but only by the usage and practice of one of the departments of Government, it is necessary *in limine* to decide whether perjury can be assigned on a voluntary declaration made respecting any "fact, matter, or thing, whatsoever," if made knowingly, falsely, &c., or only on those declarations made in "verification, assurance, or the ascertaining" of some fact, matter, or thing, respecting which a voluntary declaration is "required or authorised" by law to be made.

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We were referred during the argument to the case of the *Queen v. Pearce*, in which this Court considered what was the proper construction to be put on the Act 9 Vic., No. 9, sec. 9, which ran thus:—"And whereas it may be "necessary and proper in many cases not herein specified "to require confirmation of written instruments or allegations, or proofs of debts, or of the execution of deeds or

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" or other matters Be it therefore enacted that it shall and
 " may be lawful for any justice of the peace, notary public,
 " or other officer now by law authorised to administer an
 " oath, to take and receive the declaration of any person
 " voluntarily making the same before him in the form of
 " the schedule to this Act annexed, and if any declaration
 " so made shall be false or untrue in any material particu-
 " lar, the person wilfully making such false declaration shall
 " be deemed guilty of a misdemeanour." We then held
 that the recitals did not control the enacting part of that
 clause, and that, even if they did, the words at the end of
 the recitals, "or other matters," were not restricted to
 matters *ejusdem generis* as those enumerated, and that a
 voluntary declaration, if falsely made, respecting any matter
 whatsoever—the having seen the great sea serpent, as then
 put for illustration—might form the subject of a prosecu-
 tion for perjury. We see no reason to question the cor-
 rectness of this construction of the 9th section. Since then,
 however, that enactment has been repealed, and the
 "*Criminal Law and Practice Statute 1864*," has been passed,
 the 271st sec. of which runs thus :—" *In every case in*
 " *which, by an Act now or hereafter to be in force, it shall*
 " *be required or authorised that facts, matters, or things, be*
 " *verified or otherwise assured, or ascertained, by or upon*
 " *the oath, affirmation, declaration, or affidavit of some or*
 " *any person, if any person having, in any such case, taken*
 " *or made any oath, affirmation, or declaration, so required*
 " *or authorised, shall knowingly, wilfully, and corruptly,*
 " *upon such oath, affirmation, or declaration, depose, swear*
 " *to, or make any false statement, as to any such fact,*
 " *matter, or thing; or if any person shall knowingly, wil-*
 " *fully, and corruptly, upon oath, depose to the truth of any*
 " *statement for so verifying, assuring, or ascertaining any*
 " *such fact, matter, or thing, or purporting so to do, or*
 " *shall knowingly, wilfully, and corruptly take, make, sign,*
 " *or subscribe, any such affirmation, declaration, or affidavit,*
 " *as to any such fact, matter, or thing, such statement,*

"affirmation, or declaration, being untrue in the whole
"or any part thereof, or shall, &c., omit from, &c, he
"shall, &c."

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It was urged for the prosecution that both clauses were substantially the same—that the words "facts, matters, and things," in the latter enactment being in the plural number showed that they were inserted merely as descriptive of the subject, whatever it might be, on which the declaration was to be made, and that the clause was framed to meet existing and future legislation. We cannot think that this is the correct reading of the section. Both clauses, if contrasted one with the other, shew that there was a decided change made in the legislation on the subject, and no doubt for some reason. If these arguments are sound, not merely the introduction, but the same expressions which have apparently been advisedly and with care repeated throughout are wholly unnecessary. We were invited to reject the words in italics, or treat them as surplusage, but where words may have a very important meaning and materially affect the construction of the document, whatever it may be, so far from rejecting them, it is our duty so to apply them as to make each word of use. Read in one way, and as confining proceedings for perjury to declarations respecting matters authorised or required by statute, the clause is consistent throughout, every word is material, and none could be omitted; read in the other way, and as extending such proceedings to all declarations respecting any matter whatsoever, the clause appears operose, any departure from the section formerly in force unnecessary, and many of the words must be rejected as surplusage. We have no hesitation in deciding which of those two renderings should be adopted. We think the conviction wrong. This construction of the section renders it unnecessary to pronounce any judicial decision on the other points raised. The conviction will be quashed.

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We give no opinion upon the other grounds raised in argument, but think it right to say that they received our consideration, and we thought them of very serious importance. It is well attention should be invited to them that in any future enactment the intention of the Legislature may be so expressed as to preclude the possibility of such objections being mooted.

Conviction quashed.

END OF TRINITY TERM.

[The two following cases were accidentally omitted from the Reports of Cases in Easter Term last.]

NATIONAL BANK OF AUSTRALASIA v.
PLUMMER.

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April 7, 9.

DEMURRER to equitable plea in an action on a guarantee.

Declaration—That on 12th October 1865 in consideration that Plaintiffs would make cash advances to *John Hood* and give him credit for re-payment the Defendant promised Plaintiffs to re-pay on request the advances to an extent not exceeding £600 with interest at twelve per cent. per annum in case *John Hood* did not re-pay that after the promise and on said day and divers other days Plaintiffs made cash advances to *Hood* amounting in all to £5000 and then gave reasonable credit for re-payment and although the credit and time for repayment had elapsed before suit and *Hood* never re-paid though requested so to do and though afterwards and before suit Defendant was requested to re-pay advances to the extent aforesaid with interest aforesaid yet he broke his promise and did not nor ever would repay Plaintiffs such advances and interest and the same now remains wholly due and unpaid—Damages £1000.

Fifth plea on equitable grounds—That after the promise and after the advances as alleged Plaintiffs demanded and received from *Hood* securities for re-payment of all cash advances to him to wit mortgages leases of land assignments bills of lading and goods and chattels of

securities, whereby the risk of *P.* under his guarantee was materially, unduly, and improperly increased. On demurrer,

Held, that the bank was not bound to prove, and that the plea was therefore bad.

P., in consideration that the National Bank would make cash advances to *H.*, gave the bank a guarantee for re-payment to the extent of £600 and interest. The bank made advances to the extent of £5,000, and took over mortgages, bills of lading, &c., as security for repayment of all cash advances. *H.* became insolvent. The bank did not prove or value their security, and allowed *H.* to get his certificate. In an action by the bank against *P.* on his guarantee, he pleaded, on equitable grounds, that the bank had not proved or valued their

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the value of £5000 and took and held them as security for re-payment of all cash advances to *Hood*. And after the advances and after *Hood* was indebted to the amount in the declaration stated and while Plaintiffs still held such securities on the terms and for the purposes aforesaid and before suit *Hood* became and was an insolvent within the meaning of the statutes in force in Victoria respecting insolvents and their estates of which Plaintiffs had notice and thereupon Plaintiffs retained such securities and without consent of Defendant neglected and omitted to put a value on them or to prove for the whole or any ascertained balance of their said debt against the estate of *Hood* who afterwards and before suit obtained without opposition from Plaintiffs a certificate under the laws in force regarding insolvents and their estates which certificate was duly confirmed by the Supreme Court and *Hood* and his estate were then discharged from his said debt to Plaintiffs. And by reason of the premises Defendant lost the benefit and advantage which he should or ought to have derived from the valuation by the Plaintiffs of the ascertained balance of their debt against the estate of *Hood* and Defendant's risk under his said promise was by reason of the premises materially unduly and improperly increased.

Demurrer to plea—For that the omission by Plaintiffs to prove did not prevent them from suing Defendant on his guarantee.

Fellows (with him *Williams*) for Plaintiffs. Defendant was not damaged by the act of the bank, for he might have paid the bank and got the securities and valued them himself.

Higinbotham (with him *Macdonnell*) for the Defendant. Before Defendant could have done that, the securities may have depreciated. The surety was prevented by Plaintiffs' acts from being in the same position as he would have been

in if Plaintiffs had proved. *Pledge v. Buss (a), Watts v. Shuttleworth (b), Watson v. Alcock (c).*

Our. adv. vult.

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STAWELL, C. J.—Action against a surety for not paying the amount of the debt he had secured. The Defendant pleaded on equitable grounds, a plea which substantially amounted to this, that the Plaintiffs did not prove their debt under the insolvency. To enable the Defendant to sustain the plea, he must shew that it was incumbent upon the Plaintiffs to have proved their debt. No doubt, according to the facts, the probability of the Defendant's proving on the estate and obtaining any advantage from it is gone; but to entitle the Defendant to a perpetual injunction in equity restraining the Plaintiffs from suing him, he must shew that they have violated some duty imposed upon them. He has not done so. He has produced no authority to shew that the Plaintiffs were bound to prove. They were at liberty to sue or not to sue, to prove or not to prove (for proving is only instituting a suit in a summary way in the Insolvent Court for the recovery of the debt). If in this instance the bank was bound to prove, the Court must also hold, that in the absence of an express stipulation, a creditor secured by guarantee must, before he can enforce that guarantee, sue the original debtor. Insolvencies are a matter of public notoriety, and there is no reason why the Defendant should not have been as well aware of this, as the Plaintiffs were, and have taken such steps to protect his interests as he might have been advised. The obvious course in this instance was for the Defendant to have paid the debt, got the securities, and proved on the estate for any balance owing. Several cases were cited to us, but in all, the security itself had been altered, and had become of less

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(a) Johns., 663.

(b) 29 L.J., Ex., 229.

(c) 4 De G. M. & G., 242.

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value. Here it is shewn that the securities are of the same value as when deposited by the debtor, and those cases, therefore, do not apply.

Judgment for Plaintiff.

BROWN, APPELLANT, v. THE MAYOR, &c., OF
 FOOTSCRAY, RESPONDENT.

March 23.
 April 7, 9.

If a municipal assessment of property be made too high in order to qualify the owner to be a councillor, another rate-payer not the owner or occupier of the particular property is a person "aggrieved" within the Act No. 184, sec. 199, and may maintain an appeal against the assessment.

APPEAL case from magistrates in Petty Sessions. *Hopkins* was assessed at £25 per annum. *Brown*, a rate-payer, considered that the assessment was too high, and was a sham assessment, obtained by *Hopkins* to give him a colourable qualification as councillor. *Brown* appealed from the assessment, and the justices holding that he was not aggrieved within the meaning of the Act (d), so determined, but stated this case.

Byrne for the appeal.

No appearance *contra* (e).

Our. adv. vult.

April 9.

STAWELL, C. J.:—This case involves the question whether a person who is a ratepayer, but not the owner or occupier of a particular property, can appeal against the valuation of that property as being unfair, unequal, or unjust. From the case as it was put in the first instance, it was difficult to maintain that he was a person "aggrieved;" but, after the second argument,

(d) No. 184, sec. 199.

(e) At the request of the Court the case was, after a first argument, postponed, that counsel might be instructed and heard

on the other side. At the second hearing Mr. *Byrne* re-argued it, but still no one appeared on the other side.

it appeared to us possible, that although the Appellant was merely a ratepayer, and not the occupier or owner of the particular property, he might prove facts before the justices which would shew that he was actually aggrieved. I think the word "aggrieved," means aggrieved at the moment, and not a grievance which may subsequently occur. The Appellant substantially complains that the property was rated too high, and that the owner put this unnecessary high value upon it in order to qualify himself to be a councillor, and that he is now a councillor; that he (the Appellant) is interested in having a qualified person possessing property, a councillor, and that he can shew there is some improper practice by some person to enhance the value of this property, in order to give a qualification to the owner which he does not honestly possess. If he can prove those facts, there is no doubt that he is "aggrieved," and may maintain this appeal. According to his case, he can shew that the valuation was unfair, unequal, and incorrect. It is manifestly unfair, if one person is rated at a fair, and another at an unfair, value. This is a proper ground of appeal, as it is a just ground of grievance. We therefore think that the magistrates were premature in saying that the Appellant was not aggrieved. The case will be remitted back with the opinion that the justices ought to rehear the case, and ascertain whether the facts adduced will, according to this view, satisfy them that the Appellant was really aggrieved; for if aggrieved, an appeal to them most unquestionably lies. Although the Respondent has not appeared, there is no reason to refuse costs.

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OF
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Appeal allowed, with costs.

C A S E S

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,

AT LAW.

IN

MICHAELMAS TERM, 33 VICTORIÆ.

The Judges who sat in Banc in this Term were—

STAWELL, C. J.

WILLIAMS, J.

BARRY, J.

1869.

June 22.

September 2.

Parallel lines added to a cheque payable to bearer, and rendering it a crossed cheque, are not according to the legislation in force in Victoria, a material part of the cheque. *Williams, J., dissentiente.*

THE GOLDEN LAKE GOLD AND TIN MINING
COMPANY REGISTERED v. WOOD.

DEMURRER to plea. Declaration on a cheque in the usual form by the bearer against the maker. Fifth plea.—“That before and at the time the Plaintiffs became the bearers of the said cheque as alleged and before and at the time the said cheque was presented for payment as alleged the said cheque bore across its face two transverse or parallel lines and was a duly crossed cheque within the meaning of the ‘*Instruments and Securities Statute 1864.*’” Demurrer to fifth plea:—“For that the crossing of a cheque does not entitle the maker of it to any immunity in the event of its dishonour.”

Fellows for the demurrer.

Williams for the plea.

Our. adv. vult.

4. 2. WILLIAMS, J.—who dissented from the other members of the Court—read his judgment as follows :—

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The fifth plea, in my opinion, rendered it necessary for the Plaintiff to reply presentment through a bank if the parallel lines formed a material part of the cheque, so that the validity of the plea depends upon the construction of the 33rd, 34th, and 35th sections of the 27th Vic., No. 204. The 34th section enacts when such draft bears across its face any parallel or other lines such draft "shall" be payable only to some banker; and the 35th section enacts when such draft bears across its face an addition in writing, or stamped letters of the names of two or more bankers, the banker on whom such draft is made "may" pay the same to any or either of such bankers. In the one section the word "shall" is used, in the other the word "may." Now, on reference to the first "*Imperial Statute*" 19 and 20 Vic., cap. xxv., sec. 1, that section concludes, no doubt, with the same words as those contained in the 34th section of the 27 Vic., No. 204, "and the same shall be payable only to or through some banker;" but these words have reference to those immediately preceding them, namely—"the parallel lines shall have the force of a direction to the banker upon whom such draft is made, that the same is to be paid only to or through some banker." Clearly these words are merely directory, and control the after part of the section. I have no doubt the Legislature of this country intended the addition to be a material part of the instrument, for it purposely avoids using the words which raised all the controversy in England, namely—"shall have the force of a direction to the banker upon whom such draft is made;" although the remainder of the section adheres closely to the words of the English Act; but whether that intention has been carried out is another matter.

After the judgment in the Common Pleas in the case of *Simmons v. Taylor* (f), affirmed in the Exchequer

(f) 2 C. B., N. S., 528.

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Chamber, which decided that the addition merely operated as a direction to the banker at the time of presentment, and was not a material part of the draft, the 21st and 22nd *Vic.*, cap. lxxix., was passed, and to leave no doubt for the future, declared such addition should be deemed to be a material part of the instrument. The Colonial Act 21 *Vic.*, No. 6, was passed between the two Imperial Statutes, and seems to have anticipated the objection raised in the English Courts, omitting the words of direction, as I presume, purposely.

I am inclined to think that whenever the addition is placed upon the cheque it becomes incorporated in, and an integral part of, the cheque; and from the time the drawer or the holder, as the case may be, makes the addition, it cannot be removed, and on presentment the banker is bound to pay only through another banker. It appears to me to be like a special endorsement limiting the payment of the bill to the endorsee named, and I do not see the force of the remark in *Simmons v. Taylor* of Mr. Baron *Bramwell*, that it is an attempt to perform the impossible feat of rendering a draft which, on the face of it purports to be payable to the bearer, not payable to him. As this wonderful feat has been performed by the English statute, the 21 and 22 *Vic.*, cap. lxxix., I see no objection to the crossing controlling the word "bearer." The proposed receiver may decline to take a cheque thus restricted; if he does take it, he takes it with the restriction. He then sees the cheque is not payable to any bearer, but only to a bearer who is a banker. I think the legislation is already sufficient, and that our judgment should be for the Defendant.

STAWELL, C. J., read the judgment of himself and BARRY, J., as follows:—

It is consistent with the 5th plea that the cheque declared on was drawn, and left the drawer's hands without

the transverse or parallel lines which it is alleged to have subsequently borne. In fact, that so far as he, the drawer, was concerned, it was not a crossed cheque. We think that, irrespective of legislation, the addition of these lines to a cheque, payable to bearer, and requiring no endorsement, cannot be considered a material part thereof. They were put on after it was drawn. Why should they not be struck out before it is presented? It would be still the same cheque as it originally was. To assume that the person who takes a cheque thus crossed takes a restricted cheque, is assuming the whole question at issue; for if according to law he may at his pleasure strike out the crossed lines, he does not take a restricted cheque. The enactment gives effect to these lines if they are on the cheque—"when the draft bears them"—but does not declare they shall remain, or become part of the cheque.

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The Act describes the crossed lines as "an addition to," not as part of, the cheque. Of the two statutes passed in England on the subject—the first, 19 and 20 *Vic.*, amounts according to judicial interpretation, only to a direction to the banker. In order to avoid the uncertainty and injury which might be caused by the obliteration of crossed lines, it was enacted by the second, 21 and 22 *Vic.*, in effect that these lines formed a material part of the cheque, and could not without committing forgery be obliterated.

The local Act 21 *Vic.*, No. 5, of which these clauses in the "*Instruments and Securities Statute*" are a transcript, was passed after the 19 and 20 *Vic.*, and before the 21 and 22 *Vic.* The former contained all that is comprised in the local Act, yet it is said that the one is free from the defect or omission to which the other is subject. We have been unable to discover the means by which the subdividing clauses and omitting words, apparently mere repetition, produce the effect ascribed to them; but whatever may be the difference, if any, between them, it cannot, we think, be

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successfully maintained that the local Act has the same power in this country as the statute 21 and 22 Vic., possesses in England.

We think that these lines are not, according to the legislation in force here, a material part of the cheque, and that the mere omission to allege in the declaration that the cheque bore them—an omission which it was apparently the object of the plea to point out—cannot avail the Defendant. If the cheque was not duly presented, that can be raised as a defence by means of the proper traverse. The plea does not go on to state that the cheque was not presented through a bank, and the declaration contains an averment in the usual form of its having been duly presented. It is possible that if these lines formed a material part of the cheque the fifth plea would render it incumbent on the Plaintiffs to reply presentment through a bank, but as they do not form such a part, we need not consider the effect of the plea in that aspect. We think in the present form it affords no answer whatsoever to the declaration. Our judgment will be for the Plaintiffs.

June 25.
 September 2.

REGINA v. BONFIELD.

The clerk of a District Road Board may be appointed at the first meeting of the Board, as soon as the Board has elected a chairman. Such first meeting is not an "ordinary meeting" of the Board.

RULE nisi for a *quo warranto*, calling on *W. H. Bonfield* to shew by what authority he exercised the office of clerk of the Keilor District Road Board.

The relator was *G. R. Ely*, who claimed to be clerk of the board. He was appointed in 1863 at a meeting of the board for the election of chairman. On 4th April, 1868, he was appointed for the remainder of the current year, and in October, 1868, he received notice of dismissal at the end of the year. On 12th December, 1868, at an ordinary meet-

ing of the board, *Bonfield* was appointed. The objection taken was, that the clerk was an officer who could only be appointed or dismissed at a special meeting of the board.

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Billing and *Higinbotham* shewed cause.—The Court ought not to interfere. If *Bonfield's* appointment was bad, *Ely's* was equally so; and where the defect of title applies equally to the relator, and to the party sought to be removed, the Court will not interfere: *Rea v. Oudlipp (g)*. *Ely* was only appointed till the end of 1868, and he was paid till that time. If *Bonfield* acted on the 12th December as clerk, it was only as a substitute for *Ely*, but *Ely* had no claim after 1868, and therefore this rule ought to be discharged.

Fellows in support of the rule.—I do not rely on the appointment of April, 1868, but on that of 1863. The board has no authority to make terms with a clerk, or appoint him for a specified time. He can only be appointed during the pleasure of the council, and only be dismissed by a special meeting, for he is not a servant but an officer of the board.

Cur. adv. vult.

STAWELL, C. J.—Rule *nisi* calling upon *Ebenezer Bonfield* to show cause why an information in the nature of a *quo warranto* should not be exhibited against him for exercising the office of clerk of the Keilor District Road Board, on the ground that *George Robert Ely* was removed and the said *Ebenezer Bonfield* appointed, each at ordinary meetings of the road board.

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It was not disputed that *Bonfield*, who was *Ely's* successor, had been appointed at an ordinary meeting, and according to the affidavits on which the rule *nisi* was obtained the

(g) 6 T. R., 503.

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nature of the meeting at which *Ely's* original appointment had been made did not appear—it was merely described as one held on the 21st of November, 1863. But, according to the answering affidavits, the chairman of the board had been elected at the same meeting, and it was thereupon contended that the Court would presume the latter appointment to have been made as the Act prescribed, namely, at the first meeting; and as it was not an ordinary meeting, and no special notice could have been given of any matters to be transacted thereat, a clerk might have been then appointed. It was conceded that if *Ely's* appointment was open to the same objection as *Bonfield's*, the Court would not interfere, and the case of *Rex v. Oudlipp*, was cited, which has been recognised in *Rex v. Benney* (h), and several subsequent decisions. The question, therefore, is whether *Ely's* first appointment was properly made at the first meeting, for we will presume that the chairman was duly elected, namely, at that meeting, and *Ely's* appointment was made at the same.

The 126th section of the Act 27 Vic., No. 176, requires the board at their first meeting to elect one of their body to be chairman. The 132nd, that ordinary meetings shall be held on such day and hour as the board shall appoint. The 134th, that ordinary meetings shall be held for transacting the ordinary business of the board; and amongst the rest, for appointing and removing the inferior officers. The 135th, that where any business other than ordinary is required or intended to be transacted at any ordinary meeting, the clerk shall give notice thereof to every member; and no extraordinary business shall be transacted at the ordinary meetings, unless due notice thereof shall have been given at a prior meeting, and sent to each member in the manner required for special meetings. The 151st enables the board to appoint and employ a treasurer, clerk, surveyor, valuers, collectors, and all such other officers as

(h) 1 B. & Ad., 684.

they shall think proper and necessary. It is conceded that the clerk ought not to be regarded as an inferior officer, within the meaning of the 134th section.

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The Act requires notice of any special business to be given by the clerk, but as cases may arise in which, by death or casualty, the board may be deprived of the services of their clerk, *ex necessitate*, that portion of the Act must be regarded as directory; and notice given to each member by the chairman, considered sufficient; if this were not so, on a vacancy suddenly occurring there would be no possibility of appointing a successor. The Act does not expressly provide for the transaction of any other business at the first meeting than the election of a chairman. But if a clerk may not be then appointed, the appointment must be postponed to the next ordinary meeting, the chairman causing notice to be given to each member of the intended business. The first meeting is not an ordinary meeting—the time of holding it has not been appointed by the board. The Act does not expressly declare when the clerk shall be appointed. By implication it prohibits his appointment, as not an inferior officer, at all ordinary meetings, but it is left to be inferred when such an appointment may be made. If this were not a valid appointment, it would have been necessary to suspend all proceedings until a meeting was held for which notice of this special business had been given by a person not named as having power to issue notices. A clerk of some kind is, for all purposes relating to the working of the corporation, an essential functionary, and we conceive the appointment may be made *quam primum*—that is, as soon as the corporate body has elected their chairman. *Ely's* first appointment was consequently properly made; those made subsequently at ordinary meetings are inoperative. The first, until duly cancelled continues. The board have authority to appoint, not for a fixed period, but during pleasure. The rule will therefore be absolute; but as the objection is of a purely technical nature, which, so far as

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the objector could waive, he has waived; and as he is now obliged by no small amount of ingenuity, to eke out from his opponent's affidavits materials sufficient to sustain his application, we give no costs.

Rule absolute, without costs.

THE BANK OF VAN DIEMEN'S LAND v. THE
 BANK OF VICTORIA.

June 29.
 September 2.

A bill of exchange must be presented for acceptance within a reasonable time of its receipt by the holder, which is a mixed question of law and fact. It need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. In presenting foreign bills of exchange for acceptance, reasonable diligence is used if done on the day after receipt of the bill.

ACTION for negligence by a bank at Launceston, in Tasmania, against its agents, a bank in Melbourne.

The declaration contained six counts:—(1) For not having, as agents for the Plaintiffs, with due diligence presented for acceptance a bill of exchange drawn by *Gunn*, of Launceston, upon *Goldsbrough & Co.*, of Melbourne, endorsed to Plaintiffs, and by them to the Defendants, in order that they might get the same accepted for the benefit of the Plaintiffs. (2) For negligence, as such agents, in having allowed the bill accepted by *Goldsbrough & Co.* to remain an unreasonable time in the hands of the drawees, who, within such time, cancelled their acceptance. (3) For

A Bank received from a customer, for presentment and collection, a foreign bill of exchange on a Friday, and left it with the drawees for acceptance on the same day.

Held, that the Bank need not have presented the bill for acceptance before Saturday, and would then have had till Monday to obtain the acceptance, or the refusal of the drawee to accept, and that the circumstance of having presented the bill on Friday did not compel the Bank to obtain an answer on Saturday.

A bill was dishonoured in Melbourne on a Monday. Notice of dishonour was sent to the drawer in Launceston, Tasmania, by a mail leaving Melbourne on Tuesday. A mail had left Melbourne for Launceston on the Monday evening, but letters by Tuesday's mail were delivered in Launceston as soon as those by Monday's mail.

Held, that due diligence had not been used in giving notice of dishonour.

If a drawee has written his name on a bill with the intention to accept, he is at liberty to cancel the acceptance before the bill is delivered; or *semble*, before the fact of acceptance is communicated to the holder.

negligence, as such agents, in leaving the bill an unreasonable time with *Goldsbrough & Co.* without having demanded it, and obtained it back from them, accepted, or refused to be accepted by them. (4) For negligence, as such agents, in leaving the bill an unreasonable time with *Goldsbrough & Co.*, who signed their acceptance of it, but during such unreasonable time, and before delivering the bill to the Defendants, cancelled their signature. (5) For negligence, as such agents, in not noting the bill for non-acceptance, or giving due notice of non-acceptance to the Plaintiffs. (6) For negligence, as such agents, in wrongfully protesting the bill for non-acceptance, when in fact it had been accepted.

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Pleas:—(1) Not guilty. (2) To the second and sixth counts, that *Goldsbrough & Co.* did not accept the bill as alleged. (3) To the fourth count, that *Goldsbrough & Co.* did not sign their acceptance as alleged. (4) To the fifth count, that *Goldsbrough & Co.* did not refuse to accept the bill as alleged.

On the 2nd February, 1867, *R. T. Gunn*, a merchant in Tasmania, drew a bill of exchange, payable fifteen days after sight, for £3,000 upon *Goldsbrough & Co.* of Melbourne, against a consignment of wool, bark, &c., by the schooner *Nightingale*, then loading at Launceston for Melbourne. The bill was discounted by Plaintiff on the 4th February, and the proceeds, £2,992 10s., placed to *Gunn's* credit at the Bank of Van Diemen's Land. The bill was transmitted to the Bank of Victoria for collection, and was received by the Bank of Victoria about 12 o'clock on Friday morning, 8th February. The Bank of Victoria acted as agents in Melbourne for the Bank of Van Diemen's Land. *George Hebden*, the bill clerk of the Defendants, left the bill with *Goldsbrough & Co.* for acceptance about 2 o'clock on Friday the 8th February. He called for it on the following day at half-past 11 a.m., one

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of the clerks looked for it, did not find it, and said "The bill is mis-laid, call again on Monday." It afterwards transpired that Mr. *Parker*, one of the partners of *Goldsbrough & Co.*, had, on the 9th February, accepted this bill and two others also drawn on them by Mr. *Gunn* in favour of the Commercial Bank and *Griffiths & Co.*, and that the latter bills had been delivered to the representatives of the payees. On the Sunday, Mr. *Gunn* arrived in Melbourne from Tasmania, and Mr. *Parker* on the Monday morning arrived in town early, and told his clerk not to deliver the bill in question until further orders. *Hebden* called about 11 o'clock that morning at *Goldsbrough & Co.'s*, and saw a clerk who told him the bill was ready for delivery, but the person who had the key of the safe was out. On the afternoon of that day *Parker* saw *Gunn*, and from what transpired at the interview cancelled *Goldsbrough & Co.'s* acceptance to the Plaintiffs' bill. On Tuesday morning, 12th February, the bill was returned to the Bank of Victoria with the acceptance cancelled. It was protested that afternoon, and intimation of the dishonour of the bill forwarded to Plaintiffs by post that day. *Gunn* afterwards became insolvent, and thus the Plaintiffs could not recover from him.

It appeared also in evidence that the whole of the goods intended to be shipped by the *Nightingale* were not shipped, and that some of the bills of lading, against which the bill was drawn, were not correct.

A steamer left Melbourne for Launceston with a mail on Monday, 11th February, but Tuesday being a public holiday, letters which left Melbourne on the Monday and Tuesday, were delivered in Launceston on the same day—Wednesday. A number of witnesses were examined as to the practice of bankers relative to sending out for acceptance, on the day of their receipt, bills forwarded to them for collection, and also as to whether, the bank's closing at twelve o'clock

on Saturdays, that day should be reckoned as a business day. At the trial before *Barry J.*, the following questions were put to the jury and answered as follows:—(1) Are you satisfied that a mercantile usage has been established by the evidence as existing in Melbourne which required the Bank of Victoria to present the bill for acceptance on the day it was received? Yes. (2) Do you think that the Bank of Victoria was guilty of negligence or breach of duty in not demanding the bill to be delivered to them on Saturday, 9th February, accepted, or non-accepted? Strictly speaking, there was a neglect, but, considering the respectability of *Goldsbrough & Co.*, and Saturday being a short day, the bank was excusable in leaving the bill. (3) Do you think if the bill had been so demanded on Saturday it could have been obtained by the Bank of Victoria, accepted or non-accepted, and if so, which? Yes, accepted. (4) Do you think the bill could have been obtained by the Bank of Victoria on Monday, 11th February, uncanceled? No. (5) Do you think Saturday should count as a business day? Yes. On the first and sixth counts they returned a verdict for the Defendants; on all the others for the Plaintiffs, and damages were given on each count for 1*s.*; but leave was reserved to increase them to the full amount of the bill, £3,000.

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A rule *nisi* was granted to increase the damages either on the second, third, fourth, or fifth counts to £3,000, or in the alternative to enter a verdict for Plaintiffs for £3,000 on the sixth count.

Ireland, Q. C., Fellows, and Williams, shewed cause.—The Bank of Victoria were not bound to present the bill to the drawees on the Friday as the law gave them twenty-four hours after the receipt of a bill to present it: *Hare v. Henty (j)*, *Rickford v. Ridge (k)*, *Alexander v. Burchfield (l)*, *Tindal v. Brown (m)*, *Smith v. Mullett (n)*,

(j) 10 C. B., N. S., 65.

(k) 2 Camp., 537.

(l) 1 C. & M., 75.

(m) 1 T. R., 167.

(n) 2 Camp., 208.

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Grill v. Jeremy (o), *Firth v. Rush* (p). Their presentation on Friday was therefore a gratuitous act, and *Goldsbrough & Co.* were entitled to demand till Monday before returning it, and as on Monday it would not have been accepted, the Plaintiffs sustained no substantial damage by Defendants' acts. The evidence as to the custom of bankers in presenting bills was inadmissible, for there can be no custom here. Moreover, Saturday was what is called a "short day," that is, the banks closed at twelve o'clock. Now, the drawees had twenty-four hours within which to decide whether they would accept the bill, and these twenty-four hours would not expire at twelve o'clock on Saturday. It is admitted that Defendants were technically guilty of a breach of duty in not getting the bill on the Monday, but as they could not have got it accepted on that day, and as the drawer was then insolvent, Plaintiffs are only entitled to nominal damages. As to the sixth count, an acceptance must be in writing, and must be delivered, or an intimation given by some authorised person that it will be delivered. In this case there was no proof that the statement made by one of the clerks that the bill would be delivered was authorised, and *Goldsbrough & Co.* would not be bound by it; Defendants were therefore justified in protesting the bill: *Smith v. McClure* (q), *Churchill v. Garnett* (r).

Michie, Q. C., *Higinbotham*, and *Spensley*, in support of the rule.—The time for the presentment of a bill is a mixed question of law and fact for the judge and the jury. The bill must be presented within a reasonable time after receipt, and evidence is admissible to shew what would be a reasonable time. Having presented the bill on the Friday it is not open to the Defendants to say that they ought not to have presented it till Saturday. In strict law the drawees were not entitled to demand any time for inquiry before accepting or refusing to accept, but convenience

(o) 1 M. & M., 61.
 (p) 8 B. & C., 387.

(q) 5 East., 476.
 (r) 7 T. R., 596.

gives them twenty-four hours to do so, and although the bill was not presented till one o'clock on Friday the bank was bound to get it back during business hours next day. The law takes no notice of a short business day or a long business day, the day must be treated as a whole. Had the Bank of Victoria used diligence on the Saturday the bill could have been obtained accepted. As to the sixth count, delivery was not necessary to constitute an acceptance; an intimation that the bill was accepted was sufficient. The Defendants in protesting the bill deprived Plaintiffs of their remedy against *Goldsbrough & Co.*: *Milne v. Mawood* (s), *Serle v. Norton* (t), *Mullick v. Radakissen* (v), *Bentinck v. Dorrien* (w), *Mellish v. Rawdon* (x), *Smith v. The Hull Glass Company* (y), *Chitty on Bills*, 191; *Byles on Bills*, 178; *Story on Bills*, 253.

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Cur. adv. vult.

STAWELL, C. J., read the judgment of the Court as follows:— September 2.

The Plaintiff—a bank in Tasmania—was the endorsee of a draft drawn by one *Gunn*, resident there, on the house of *Goldsbrough & Co.*, merchants, Melbourne, for £3,000, at fifteen days after sight. The draft was indorsed and transmitted to the Defendant—a bank in Melbourne—for presentment and collection. The action was for negligence, the declaration containing six counts:—
(1) For not having duly presented. (2) For having allowed the draft, after it had been accepted, to remain an unreasonable time in the drawees' hands, who, within that time, cancelled their acceptance. (3) For having left the draft with the drawees for an unreasonable time, not having

(s) 15 C. B., 778; S. C., 24 L.
J., C. P., 36.
(t) 2 M. & Rob., 401.
(v) 9 Moore's P. C. C., 46.

(w) 6 East., 199.
(x) 9 Bing., 416.
(y) 11 C. B., 897.

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demand and obtained it within a reasonable time, accepted or refused to be accepted. (4) For having allowed the draft after the drawees had signed their acceptance to remain an unreasonable time in their hands, who within that time before they delivered it to the Defendant cancelled and revoked their signature. (5) For having neglected to note the non-acceptance. (6) For having wrongfully, after the draft had been accepted, protested it for non-acceptance. Pleas:—Not Guilty, and traverses of the drawees having accepted, signed their acceptance, or refused to accept. Issues were joined and the case tried.

The draft was received by the Defendant on Friday, 8th February, 1868, and at one o'clock p.m. it was given to the bill clerk, who at two o'clock p.m. presented it for acceptance, leaving it with a clerk at *Goldsbrough & Co.'s* counting-house. On Saturday, the 9th, the firm's acceptance was written by one of the partners, and the draft so accepted given to a clerk to be delivered in the usual course; after this it was by some accident mislaid, and when demanded on this day on behalf of the Defendant could not be found. The clerk who called for it was told, "Bill is mislaid; call again on Monday." On Monday, the 11th, before the drawees' counting-house was opened, one of the firm, in consequence of information he had received, directed that the bill should not be delivered, and in a subsequent part of the day cancelled the acceptance. He had discovered that the goods against which the draft was drawn had not been shipped; the drawer was in insolvent circumstances, and in the drawees' debt £2000 and upwards. The bill was on the same day, Monday, demanded on the part of the Defendant, and the applicant was told by a clerk to the effect that "the bill was ready to be given up, but the person who had charge of it was out." On Tuesday, the bill, with the acceptance cancelled, was given to the defendant and protested. Notice of dishonor was forwarded to the Plaintiff that evening by mail to Tasmania. A mail

had been also despatched on the evening of Monday; but letters by the mail of Tuesday were, in consequence of a holiday, delivered at their address as soon as those by the mail of Monday. The insolvency of the drawer, *Gunn*, was admitted during the trial. A verdict was returned for the Defendant on the first and last, and for the plaintiff on all the other counts, damages 1s., the jury answering certain questions submitted to them, and leave having been reserved to either side to move to set aside an adverse verdict on any issue, and to the plaintiff to increase the damages to £3,000. The present rule was obtained to increase the damages on the second, third, fourth, and fifth counts to £3,000, or to enter a verdict for the Plaintiff on the last count, on the ground that he was proved to have been damnified by the wrongful protest by the Defendant of a bill of exchange accepted by the drawees, and which they had no power to cancel.

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The bill is payable a certain number of days after sight; presentment, therefore, was necessary in order to fix the time from which those days commence. No special duty is laid in the declaration, nothing beyond that usually observed by a banker towards the customer who transmits a negotiable security to be presented, and if dishonoured, to take the necessary steps in proper time, but if paid, to receive the amount, and deal with it according to instructions. The duty so laid is that which the evidence sustains. Although nothing beyond the usual routine was to be observed; it might have so happened, however, that had the Defendant pressed for an answer, or protested the bill for non-acceptance on the Saturday, the drawees, in ignorance of the true state of *Gunn's* affairs, and of the non-shipment of the goods against which the draft had been drawn, would have delivered it, and have thus, to their own loss, been compelled to pay the amount, as their acceptance, once delivered, would not have been dishonoured. The action is, in truth, brought to recover the amount from the Defendant

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which it is alleged might thus have been obtained from the drawees. The duty apparently is of the ordinary kind, but the circumstances under which the Plaintiff seeks to recover from the Defendant are peculiar.

It will facilitate the deciding on the question of negligence, or, as it may be really considered, breach of duty, if the case is divested of all extraneous matter, and thus the true nature of that duty ascertained. With this object, it may be regarded as the ordinary instance in which, by the laches of the holder, to present or give notice of dishonour, in due time the drawer or previous endorser has been discharged. The Judicial Committee of Her Majesty's Privy Council, in *Mullick v Radakissen*, approved of the principle laid down in *Muilman v. D'Equino* (x), and *Mellish v. Raudon*, namely, that a bill must be presented within a reasonable time, which is a mixed question of law and fact—that in determining that question, not the interests of the drawer only, but those of the holder, must be taken into account, and that the bill need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. In *Smith v. Mullett*, and *Grill v. Jeremy*, it was decided that notice of dishonour need not be sent until the day after that on which the person himself received it, Lord Tenterden, in *Grill v. Jeremy*, observing, "In these cases it is of great importance to have a fixed rule, and not to resort to nice questions of the sufficiency in each particular case of a certain number of hours or minutes;" and Lord Ellenborough, in *Smith v. Mullett*, "It is of great importance that there should be an established rule upon the subject. If you limit a man to a fractional part of a day, it will come to a question of how swiftly the notice can be conveyed—you will have a race against time;" and in *Rickford v. Ridge*, it was held that a banker in London who receives a cheque is not bound to present it for payment till the following day. "Bankers would be kept in a

(x) 2 H. Bl., 565.

continual fever if they were obliged to present a cheque the moment it was paid in." In *Hare v. Henty* the same principle was recognised as regards country bankers. Since some of these decisions were pronounced, clearing-houses have been established in London and other places, but where they have not been established, or in cases in which the practice arising from their having been established does not apply, the rule last mentioned may now be regarded as settled, and applicable to bills of exchange as well as to cheques. For, independently of authorities on the point, if any greater despatch were required in the one case than the other, a cheque which ought to be treated as payment should be presented at least as soon, to obtain that payment, as a bill to be accepted. At first sight, the two chains of authorities to which we have referred appear somewhat opposed one to the other, but on examination we think they in no way conflict. Where the time required for the performance of the act cannot vary to any great extent, as in accepting or refusing to accept a bill after it has been presented, the general convenience arising from uniformity has established a general usage by which the meaning in all such cases of reasonable diligence according to the law merchant has been determined. So also in cases of giving notice of dishonour, or of presenting cheques for payment, or bills of exchange for acceptance by bankers in the same town, reasonable diligence has been used if the presentment is made, or the notice of dishonour given, on the day after receipt. Where, however, the time for the performance of the act may vary very considerably in different cases, where no general usage could well arise, and none has been established, or where several and conflicting interests must be considered, there the matter is necessarily a mixed question of law and fact. Both were so, but one by judicial decisions on general usage, has become part of the law merchant, and has, therefore, ceased to be a question of fact. The other has not so become, and therefore still continues as it was, a subject involving both questions of law and matters of fact.

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We need not decide whether evidence of a special local usage in opposition to the law merchant is properly receivable; it has been received, but it fails, in our opinion, to establish, even within the limits of the city of Melbourne, a general, uniform, and reasonable usage to present bills of exchange for acceptance on the same day they have been received. Statements of bankers that they would send foreign bills out for acceptance on the day they received them, if they could, but if it was a heavy mail, on the next day, prove no such usage in our opinion. On the contrary, they show the danger of hastily accepting those statements as proof; for, if such usage were once established, the size of the mail would afford no excuse for non-compliance. It can readily be understood why, for the sake of themselves or their constituents, bankers may be desirous to obtain the acceptance of any drafts as early as possible, but there is a clear distinction between such a desire and proof of any reasonable, uniform, and generally recognised usage—a usage, too, which, it is said, has in a particular locality altered the law merchant. The verdict for the Plaintiff, awarding only nominal damages, when closely examined, supports the view that a uniform usage has not been proved. It was left to the jury to give nominal or substantial damages, as they found the Defendant had or had not been guilty of negligence in not obtaining an answer on Saturday. If it was necessary to present on Friday, an answer ought to have been obtained on Saturday, and the omission to do so could not be cured by any reliance on the mercantile position of the drawees. As the bill might have been obtained accepted on the Saturday, and if then obtained would have been met at maturity, the Plaintiff was entitled to substantial damages; the answers to some of the questions are no doubt opposed to this view of the verdict.

Continuing the consideration of the subject, we think that if notice of dishonour had been given on Monday, the Defendant would not have been liable had the action been

brought for not having given that notice in due time. A bank is allowed a day to present a cheque or give notice of dishonour, and by analogy we think that, under ordinary circumstances, the Defendant had until Saturday to present, and until Monday to obtain an acceptance or refusal to accept, and, if not accepted, give notice of dishonour. The probability that pressure, or threat of protesting the bill if not accepted, would have led to its being delivered accepted on Saturday, in no way affects the question of negligence; for it formed no part of the Defendant's duty to press that the draft should be accepted, or that the acceptance, if signed, but not delivered, should be delivered to him. The Defendant *was*, in our opinion, simply to present and obtain a distinct definite answer one way or the other. We make these observations because during the argument the case was put for the Plaintiff as if the Defendant was guilty of negligence merely, because this draft was not obtained on the 9th, accepted in the same way as one of the other drafts on the same drawees was obtained by the holder thereof. If the legal obligation be correctly stated, as we believe it to be, it cannot be received as sound reasoning that, because another person, the holder of another draft, procured the acceptance of that draft a day before he was entitled to insist on its delivery, the omission to act as he did affords any evidence of negligence on the part of the Defendant.

The Plaintiff, however, without admitting that due diligence would have been used if there had been presentment on Saturday, an answer on Monday, and notice then given, contended that the Defendant, whether rightly or wrongly, having presented on Friday was bound to obtain an answer on Saturday. It was not competent for the bank, it was said, consistently with its duty to the Plaintiff, having once presented, to make any other division of the interval between the receipt of the draft and the time when notice of dishonour should have been given. Although the Defendant

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had to perform two acts—present and obtain an answer—and separate times are allotted for the performance of each, yet both combined constitute only one duty, namely, obtain an answer, and if required give notice with due promptness. It does not, however, necessarily follow that the time can be divided to suit the Defendant's views; and this, in our opinion, is the gist of the present case. It appears that without in any way consulting the convenience of the bank, or, so far as could then be supposed, lessening the prospect of the drawees accepting, the period allowed by law to present was voluntarily, on the defendant's part, abridged, and the draft presented earlier than was required. It cannot, we think, be fairly said, apart from the special circumstances which subsequently transpired, that thus leaving a draft with the drawees longer than the law required was likely to prevent its ultimate acceptance. The time now allowed is so allowed in order to afford the drawee full opportunity for removing any scruples, and satisfying himself as to whether he should accept or not. Had that time been abridged, or a longer time taken by the holder to present, the case would have been very different. Does, then, this voluntary abridging of the time for the first of the two acts deprive the Defendant of any portion of the full time allowed for both—of the period, in fact, within which he might, but for this abridgment, have given notice of dishonour? There is no express decision on the point. *Hare v. Henty* is not, in our opinion, a direct authority, as was contended for the Defendant. Still, considered in all its parts, it appears to recognise the principle, that if there are two courses open to the holder of a cheque as regards presenting it for payment, he may pursue either so long as the time allowed by law for that presentment is not exceeded. The cheque in that case forwarded by the night post of Friday, the day it was received, to the clearing-house, might as well have been sent direct to Lewes for presentment, but the celerity in thus despatching it did not determine the case against the then Defendant; still less

was the question held to be a matter of fact for the jury. And in the present case we think the circumstance of having presented the draft on Friday did not compel the Defendant to obtain an answer on Saturday, or preclude him from dividing the interval so as to allow less time for presentment, and thus inconvenience only the Bank of Victoria, and more time for acceptance, and thus convenience the drawees. In fact, the Plaintiff's argument would almost lead to this conclusion, that the Defendant was guilty of negligence, because he (the Plaintiff) did not receive notice of dishonour sooner than the law required; for had the bill been protested on Saturday, a mail made up, as it might have been, on that night, and notice of dishonour forwarded by that mail to the Plaintiff in Tasmania, he would thus have received it earlier than he was entitled; and yet the Defendant, it is urged, must be held to have discharged his duty negligently because notice was not sent thus earlier than was necessary.

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On the 11th, the draft could not, according to the evidence, have been obtained accepted. Had it been protested and notice sent on that day, due diligence would have, in our opinion, as we have already said, been used. Notice, however, was not sent until Tuesday, the 12th, and though it was received as soon as if it had been forwarded on Monday, we think due diligence was not used. We cannot speculate as to results. The fact remains that, whatever the effect might have been, even if due diligence had been used, it has not, and the verdict, therefore, must stand, though the damages ought to remain only nominal, as the drawer was insolvent.

We think, too, the division of the time in this case is a question for the Court, and not for the jury. If they were to determine whether the time could not have been thus divided, they would, in effect, decide on whether a bill should be presented on the day it was received, or the day

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after, a question upon which, in the absence of proof of a special usage on the subject, it is not for them to pronounce.

According to our view, the verdict for the Plaintiff, with nominal damages on the fifth count, should stand. No cross rule has been taken out as regards the second, third, or fourth, and the Plaintiff has addressed his arguments to an increase of damages on the fifth; we need not, therefore, specially consider any of the preceding.

It only remains to dispose of the cause of action in the last count. Much stress was laid during the argument on the Plaintiff's right to have a verdict on that count with substantial damages, the acceptance of the firm having been, in fact, written on the draft on Saturday, and the answer then given to the Defendant's clerk who called for it to the effect that "Bill was mislaid; call again on Monday;" and on Monday that "Bill was ready to be delivered up, but the person who had charge of it was out," amounted, it was contended, to evidence of a complete acceptance; or, if it did not, the conversation between the bank clerk and a member of the firm of *Goldsbrough & Co.* on Tuesday, 12th, was an estoppel which precluded the drawees from saying the draft had not been accepted, and from cancelling the acceptance; so that to protest the draft afterwards was negligence on the Defendant's part. In *Cox v. Troy* (a), it was determined that, even if the drawee has written his name on the bill with the intention to accept, he is at liberty to cancel the acceptance before the bill is delivered. To this summary of the decision Mr Justice Byles has added in his work on bills, "or, at least, before the fact of acceptance is communicated to the holder." Now, the Plaintiff has, in our opinion, failed to establish facts which support either the ruling or the comment. There is no proof whatever of actual delivery. The answer on Saturday affords no evi-

(a) 5 B. & Ald., 474.

dence that the bill had been accepted, and there is no proof of any authority on the part of the clerk to return the answer he did on the morning of the 11th; the fact of directions having been issued by the drawees—his employers—on that morning not to deliver up the bill negatives any presumption that could fairly be raised to the contrary. Nor does the conversation referred to amount, in our opinion, to any admission that the draft had been accepted. The clerk said he went to procure the drawees' acceptance—if already accepted, this was unnecessary. The observation, "It was reported accepted; I consider it was accepted, and beg of you to accept it," corroborates this view, namely, that the bank never supposed the draft had been fully accepted. The answer, "I won't accept," contains, in our opinion, no admission that, having been accepted, it had been ordered to be delivered—it meets the question put, "And I beg of you to accept," which, we think, was all that was then required of the person addressed. We are of opinion that the draft, though accepted in writing, never was delivered as an acceptance, nor admitted to have been so delivered, nor was anything which could be regarded as equivalent to a delivery having taken place communicated by a duly authorised agent. The rule obtained will be discharged.

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RYALL v. KENEALY.

SPECIAL case by way of appeal from the magistrates at Melbourne. The case was stated substantially as follows:—

Sept. 2, 3, 4.

The
"Constitution
Statute" gave
the Legis-

lature of Victoria authority to "re-enact" existing laws; and the 22 Vic., No. 68, in making perpetual the 18 Vic., No. 3, was a "re-enactment" of it, by virtue of which it is still in force. The "*Influx of Criminals Prevention Act*" (18 Vic., No. 3) applies equally to absolutely, as to conditionally, pardoned criminals; and the Crown in assenting to that Act, expressed an intention that the Royal prerogative should be exercised subject to it.

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"The complaint alleged that *John Kenealy* came into Victoria illegally, contrary to 18 Vic., No. 3. The Defendant pleaded not guilty, and after hearing the parties and evidence, was convicted, and ordered to enter into recognizances, himself in £500, with two sureties in £250 each, upon condition that within seven days after his conviction he should leave the colony.

"It was proved or admitted upon the hearing as follows:—The *Geelong*, carrying the English mails, and touching at King George's Sound, Western Australia, arrived in Hobson's Bay on the 6th July, 1869. A detective police officer, on the same day, went on board the steamer, and made inquiries if there was any person on board who had arrived thereby from King George's Sound. Defendant replied that he had so arrived from King George's Sound. The officer then asked Defendant to produce his certificate. Defendant delivered to the officer the following certificate, produced at the hearing:—

"Western Australia,

"Resident's Office, Albany, 29th June, 1869.

"I hereby certify that the bearer *Mr. John Kenealy*, about to proceed to Melbourne per P. & O. Company's steamer has been a prisoner of the Crown in Western Australia. He has received a free pardon.

"Signature of officer appointed } (Signed)
 to issue certificates. } "A. COCKBURN CAMPBELL, R.M.

"The said steamship came direct from King George's Sound aforesaid. The officer said to Defendant, 'I see you have been a prisoner;' and he said 'Yes, a political prisoner.' The officer asked Defendant what he meant by that, and whether he was concerned in the Fenian conspiracy. Defendant said 'Yes.' The officer asked Defendant what sentence he (Defendant) had got? The Defendant replied ten years. The officer then told him (Defendant) that he had no right to be in the colony of Victoria, and stated that he would have to arrest him, because he was illegally at large in Victoria aforesaid. Defendant replied that there was no occasion for that, and gave to the officer references to the Hon. *John O'Shanassy*, Hon. Captain *MacMahon*, and the Hon. *C. Gavan Duffy*, members of the Legislature of Victoria, and other gentlemen of importance in the colony of Victoria, and stated that if he were allowed to go on shore he (Defendant) could be easily found. The officer further asked him (Defendant) if he intended to reside in Victoria, and he said Yes, if he was allowed, and added that he did not wish to break the law. The officer further asked him (Defendant) where he was going to reside, and in reply Defendant mentioned the name of the Duke of Rothsay Hotel in Melbourne. Defendant took a document from his pocket, but the officer did not read it. Defendant was asked by the officer what it was, and he said 'The Queen's free pardon.' The officer deposed that he had not seen Defendant since to speak to him;

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"that he had not known the Defendant at any time before the present. That he (the officer) always went on board steamers arriving per King George's Sound aforesaid, and made inquiries for persons from the last-mentioned place. That he had no special instructions with regard to Fenians; that he never had any communication from any one respecting Defendant." [The case then set out the evidence of Superintendent Ryall and Detective Black. Ryall proved the arrest of the Defendant at St. Patrick's Hall. Black that the Defendant had not been in the colony since 1853 till lately. On cross-examination this witness admitted that there were numerous persons in the colony since 1853 whom he did not know, and that he could not tell whether Defendant had been in the colony before 1853.]

"It was admitted upon the hearing that Kenealy had been convicted at a special commission, holden in Cork, in Ireland, on the 14th December, 1865, of a transportable felony, namely, the crime commonly and usually described as treason felony, under the Act 11 and 12 Vic., cap. 12, the special commission being a court of competent jurisdiction, and had by that court been sentenced to ten years' transportation, and had been transported, in accordance with such sentence, to Western Australia. In order to prove the identity of the Defendant, and the fact of his transportation, the prosecution called for the production of the certificate of pardon by the Defendant, which said certificate was accordingly produced by him, and read on the part of the prosecution as follows:—

"FREE PARDON.

"WHEREAS Reg. No. 9795 John Kenealy was convicted of treason felony at Cork in Ireland on the fourteenth day of December one thousand eight hundred and sixty-five and sentenced to ten years' penal servitude

"AND WHEREAS Her Most Gracious Majesty Queen Victoria issued a warrant under her sign manuel and signet given at the Court of St. James's on the twenty-fourth day of February one thousand eight hundred and sixty-nine in the thirty-second year of her reign and directed to the Governor of Her Majesty's territory of Western Australia Whereby her said Majesty was graciously pleased to grant to the said John Kenealy a free pardon for the crime of which he stands convicted

"Now I John Bruce Governor, and Commander-in-Chief of the territory of Western Australia aforesaid do hereby certify and make known to all whom it may concern that the said John Kenealy has therefore become entitled to the above-named free pardon of Her Most Gracious Majesty Queen Victoria.

"Given under my hand and the public seal of the said territory at Government-house Perth this fourteenth day of May in the year of our Lord one thousand eight hundred and sixty-nine.

"J. BRUCE

"Governor and Commander-in-Chief."

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"It was admitted that the *John Kenealy* therein mentioned was the Defendant, and that he had received the free pardon of Her Majesty, by virtue of a warrant under sign manual and signet, given at the Court of St. James's, on the 24th February, 1869, and directed to the Governor of Western Australia, in whose custody the same now remains.

"The Defendant called no witnesses, but contended that proof should have been given that he had not been in the colony of Victoria prior to the passing of the Act 18 Vic., No. 3, and that no such proof was in fact given; that the said Act 18 Vic., No. 3, is not now in force; that the said Act did not, in both or either of the first and second sections thereof, on which the said charge was founded, create any offence, and that in fact the Defendant was not prohibited by any provision of the said last-mentioned Act from coming into Victoria; that the Act had no application to the Defendant under the circumstances above set forth; that the said last-mentioned Act only applied to convicts whose terms of imprisonment had expired; that the effect of his free pardon from the Queen exempted him from the operation of the said Act, and restored him to the position of a new man who had not been so convicted; that the said Act could not, and did not, control the Royal prerogative, and did not affect any pardon granted by virtue of such prerogative. The magistrates determined that the matter stated afforded no grounds of answer or defence to the information. The question for the opinion of the Court is whether the said determination was erroneous in point of law."

Ireland, Q.C. (with him *Adamson*), for the Prosecutor. As to the first objection taken for the Defendant, it was for him to give evidence that he was in the colony before 1854, although the prosecutor has given negative evidence so far as he could. It was proved that *Kenealy* was seen to arrive in Hobson's Bay by the mail steamer, and one officer said he had never previously seen him in Victoria. It is then said that the "*Influx of Criminals Prevention Act*" is not in force here. The 18 Vic., No. 3, was passed on the 16th November, 1854, and by sec. 16 was to continue in force for one year from the passing, and thence to the end of the next session of the Legislative Council. In February, 1856, the 19 Vic., No. 3, was passed temporarily, continuing the Act, and a further Act was passed in February, 1859, reciting that certain acts were about to expire, among others 18 Vic., No. 3, and 19 Vic., No. 3, and enacting that

they should continue as they had been altered or amended until otherwise provided by law. It is said that because the 18 *Vic.*, No. 3, and 19 *Vic.*, No. 3, had not been altered or amended, therefore they were not continued—a proposition simply absurd. It is also urged that the pardon by the Queen prevents the Act applying; that the Royal prerogative must be taken away by express words, and that there are no such words in this Act. *Dover v. Maester* (b) draws the distinction which is always recognised, that in offences committed at common law the Royal pardon wipes out the crime; but that the pardon cannot get rid of any consequences imposed by statute. At common law, a pardon obliterates all the consequences flowing from the offence, but in the case of an offence under a statute it may wipe out the punishment, but cannot prevent the other consequences imposed by the statute. The language of the 18 *Vic.*, No. 3, is express, and is sufficient to take away the Royal prerogative. In many acts there is a saving clause, that nothing therein contained shall be taken to affect the Queen's prerogative, but that clause is absent from this Act.

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Mackay (with him *Fellows*, *Hearn* and *O'Leary*) for the Defendant. On the construction of the Act, the ground and cause of making the statute may be considered so as to explain its intent. *Plowden* 173 and 174; *Com. Dig.* Tit. Parliament, B. 11. The Act 18 *Vic.*, No. 3, was founded upon evidence taken before a select committee of the Legislative Council. It was intended only to apply to persons who had come from Tasmania, who had been sent there as robbers or murderers, &c. But it cannot apply to political offenders. [*Stawell*, C. J.—Surely we have nothing to do with the nature of the offence. We must deal with the fact that this person has been convicted of a transportable felony.] The re-enactment of an expiring law by a continuing Act is not within the authority of the Legisla-

(b) 5 *Esp.*, 92.

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ture. [Stawell, C. J.—Then the Legislature may pass any Act it pleases, except to continue one—may alter or repeal an Act, but cannot continue one.] It has only a limited jurisdiction. [Stawell, C. J.—Yes; but surely this does not go beyond the limit.] The 18 Vic., No. 3, only applies to expirees, not to persons pardoned. The Court will consider the class of persons for whom the Act was intended. *Sparkes v. M'Farland* (c), *Jenkinson v. Thomas* (d). Pardon annihilates the judgment against a prisoner. The general rule of law is that the prosecutor is bound to prove his case, unless in exceptional cases provided for by statute. In the present instance, the prosecutor should have exhausted all the means of proof as to the Defendant not having been in the colony before 1854. It was quite consistent with what had been proved, that he had been here and gone home again. [Stawell, C. J.—*Black's* evidence is certainly not worth much, but apart from that there is *prima facie* evidence on the point; the man arrives here by ship; he speaks as if he was a perfect stranger to the colony—as if he knew nothing about the colony.] It must be proved beyond reasonable doubt that the Defendant was not here in 1854. He might have been here, gone home, and been transported afterwards. The Act 18 Vic., No. 3, interferes with the prerogative, and under the Governor's instructions it should have been reserved for the Royal assent. [Stawell, C. J.—If that is a defect, it is cured by 28 and 29 Vic., cap. lxiii.] Admitting, then, that the Act is valid, it cannot overrule the pardon granted by Her Majesty. The prerogative of the Crown is never affected unless by express words or necessary implication. *Rex v. Parsons* (e), 2 Edw. III., cap. ii. The authority of the King to pardon exists at common law. *Earl of Danby's Case* (f), 4 *Stephen's Commentaries*, 524 and 525, notes, *Rookwood's Case* (g). In *Cunnington v. Wilkins* (h) it was held that where a man

(c) *Ante*, Vol I., Law, 90.
(d) 4 T. R., 665.
(e) 1 Show, 284.

(f) 11 State Trials, 769.
(g) 13 *Ib.*, 183.
(h) Hobart, 67, 84.

had been pardoned it was actionable to call him a thief. The 7 and 8 *Geo. IV.*, cap. xxviii., sec. 13, in saving the Royal prerogative, provided that where a man had received the Royal pardon he was not to be relieved on a second offence from any penalties the Legislature might impose on the commission of a second offence, showing that but for that proviso the first offence was wholly wiped out. [*Stawell*, C. J.—I think it shows that a pardon is subject to the liabilities imposed by statute; and, therefore, by assenting to 18 *Vic.*, No. 3, the Queen impliedly assented to the conditions imposed by that Act being included in any pardon by her.] A pardon gets rid of all liabilities, even those created by Parliament. *Bac. Abr. Tit. Pardon, Oro. Eliz.*, 814, *Cro. Jac.*, 146, *Rex v. Crosby* (*j*), *Bentley's Case* (*k*), *Rex v. Miller* (*l*), *Reg. v. Boyes* (*m*). The Act 19 *Vic.*, No. 3, passed in February, 1856, was limited in its operation to one year from its passing and thence until the end of the then next session of the Legislature. That Act was not revived, and consequently the subsequent Act 22 *Vic.*, No. 68, passed in 1859, professing to continue but not revive it, had nothing to operate upon. [*Stawell*, C. J.—On what is that proposition founded?] Section 63 of the present "*Constitution Act*" kept alive the 13 and 14 *Vic.*, under which the old Legislative Council was empowered to act till the writs were issued for the new Houses, while, but for that section, the functions of this body would have ceased in November, 1855. By the same Act, section 40, all laws and statutes which, at the time of the passing of the Act, were in force in Victoria, were continued as if this Act had not been passed. Now the 19 *Vic.*, No. 3, continuing 18 *Vic.*, No. 3, was not in existence at the date of the passing of the "*Constitution Act*;" it did not come into force till the following February. No provision was made for the continuation of acts passed in that interval, and, therefore, when the Act under which the legislation took place expired, viz., on the

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(*j*) 2 Salk, 689.
(*k*) Fitz. Rep., 140.

(*l*) 2 W. Bl., 797.
(*m*) 30 L. J., Q. B., 301.

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issue of the writ for the new Parliament, the intermediate legislation expired with it.

STAWELL, C. J.—The only point that we think requires consideration is that raised about the expiration of the Act 19 Vic., No. 3.

Our. adv. vult.

September 4.

STAWELL, C. J.—Several objections have been argued before us—some reserved for our consideration and others offered on the case. Although of an extremely technical nature, in a criminal proceeding it is only right that every possible objection that can be raised should be raised. The objection which it is most convenient to consider first is that the Act 18 Vic., No. 3, is not in force. It was passed in 1854, having been the third on the same subject, and is supposed to have been continued by 19 Vic., No. 3, and made perpetual by 22 Vic., No. 68. This last named statute enacts that certain acts enumerated in a schedule, as the same have been altered or amended, shall be continued in full force and effect. The preamble to the Act recites the schedule containing the Acts referred to, and in that schedule 18 Vic., No. 3, and 19 Vic., No. 3 appear. The first ground in support of this objection then is, that inasmuch as it does not appear that these Acts, 18 Vic. and 19 Vic., had been altered or amended, although they were specified in the schedule, they could not be Acts intended to be included in the schedule, and they had therefore expired. Now, supposing the schedule to be rejected, and that it is necessary the Acts should be altered or amended, it appears to us that they have been altered or amended, inasmuch as while previously they were in force for only one year from the passing, the effect of this statute, 22 Vic., No. 68, is to make them perpetual. We think, too, that the fact that these Acts are specified, both by date and title, is sufficient to make them valid.

The next ground is that the "*Constitution Statute*" 19 *Vic.*, enables the Legislature to repeal or vary Acts existing at the time the "*Constitution Act*" was brought into operation; and it is contended that the meaning of this language is, that the legislature may repeal or vary an existing Act, but cannot continue it. We think that to continue an Act is to vary it. The objection is rather to the form than the effect of the legislation. Supposing the objection to have any force, it is our duty where an Act is passed—as where a deed is made by parties—to so construe the Act or deed as to render it valid rather than invalid and useless. We think that these powers gave the Legislature authority to re-enact existing laws, and we think that the 22nd *Vic.*, No. 68, in making perpetual 18 *Vic.*, No. 8, was a re-enactment of it.

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The next ground is that the Act is opposed to the Royal instructions. We think that a reference to the "*Imperial Statute*" 28 and 29 *Vic.*, cap. lxiii., affords a sufficient answer to the objection.

Another and the last ground is that the Act has expired altogether, and that is dependent on the construction to be placed on our "*Constitution Statute*." That measure, as is generally known, was drawn up in this country by the Local Legislature, with a view of being submitted to the Imperial Parliament, as expressing the opinion of the country on the subject; and the Parliament at home afterwards embodied it as a schedule to an Imperial Act. It was enacted that it should come into force when it was proclaimed. Power was given by the 27th section to the Legislature in existence at the date of its passing—the Legislative Council—to pass certain measures necessary to enable the first elections to be held under the new Constitution—in point of fact, to pass an electoral Act; for it was supposed that without that special power it would not have been within the province of the Legislative Council to do so.

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The 13 and 14 *Vic.*, cap. lix., under which the previous Legislature met, was to be repealed on the proclamation of the statute to which our "*Constitution Act*" is a schedule; and in the last clause of that Act, repealing the previous Acts on the subject, there is this proviso:—"Provided that "so much of the last-mentioned Act (13 and 14 *Vic.*, cap. lix.) "as relates to the constitution, appointment, and powers "of the Legislative Council of the said colony of Victoria, "shall continue in force till the first writs shall have been "issued for the election of members to serve in the Legislative Council and House of Assembly, in pursuance of the "provisions hereof, but no longer." Then it is argued that though the powers of the Council are continued from the proclamation of the "*Constitution Act*" till the issue of the writs for the new Parliament, those powers were limited to pass laws to exist only for the interval in which the Council continued to exist, or in other words, that the Council ceasing the laws which had passed ceased also. This argument is based upon clause 40, which enacts that "all laws "and statutes which at the time of the passing of this Act "shall be in force in Victoria, shall remain and continue to "be of the same force and effect as if this Act had not been "made." It is said that this section is necessarily limited to Acts that were in existence at the date of the proclamation, but that it does not continue Acts not in force at that date, but which were passed between that time and the issue of the writs for the new Houses. Even granting that there is any weight in this argument, the Act to which I have already referred, 22 *Vic.*, No. 68, passed long after the "*Constitution Statute*" came into force, re-enacted the dead Act. Parliament, it must be assumed, knows the law, and yet if the objection I am now noticing were a good one, they would have intentionally inserted in the schedule an Act which could only be useless and inoperative, unless they intended to re-enact it. We are not to suppose that they would do that. As regards this particular objection, therefore, we may hold 22 *Vic.* No. 68, a re-enactment of 18 *Vic.*

No. 8. It is said that section 40 is a necessary clause, that it ought to have been inserted, and was not inserted, merely *ex abundante cautela*. We have not been referred to any authority to support that view; nor do I see the analogy between this case and that of a corporation. A corporation is a body possessing limited powers within a limited locality, and when it dies all that it has done may possibly die with it. But here there was only an alteration in the constitution of Parliament. A Parliament still continued; it may be a differently elected Parliament, but it is still a Parliament. There must be some mode by which the laws of the country can be altered, and new laws enacted; and the Parliament in this country was by the "*Constitution Act*" continued, subject to a modification of the laws of election. The analogy, therefore, between the case of a limited corporation, on whose life or death a community by no means depends, and the Parliament of a country, is not very apparent. Assuming, however, that section 40 was inserted from necessity and not from caution, I think that the objection raised to the 18th *Vic.* No. 3, on the ground I am now considering, has not been sustained. It is said that the powers conferred on the Legislature by sec. 27 of the 19th *Vic.* are from a different source than those in the 63rd. I confess I do not see it. Section 27 confers no more special power than the 63rd. It merely declares that the Legislature may pass an Electoral Act. But the power on which the Legislature was dependent for the exercise of its authority, the 13 and 14 *Vic.*, cap. lix., was repealed absolutely, and thus section 27 must be held to have revived that power so far as to enable it to pass an electoral law—it continues the Legislative Council for that purpose, and the 63rd section continues it for other purposes. It is conceded that the powers given by the 27th section are still in force, although they are not referred to in section 40; if so, by parity of reasoning, so must be the powers under the proviso in section 63. In fact the proviso is stronger than the section, for the absolute repeal of the statute precedes

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it, though it follows the section. In the form of a proviso it must necessarily be held a re-enactment. There is also another answer to this objection generally, namely, that in the case of a body possessing legislative functions, its existence being of unlimited duration, and its powers unlimited also, so far as the duration of those powers is concerned; if that body cease, so may the acts performed in the exercise of those powers be held perhaps to cease too; the authority which originally created it having altered its intention, and determined on destroying it, and with it of course all its acts. But where a body is called into existence for a limited duration, having powers unlimited as regards acts performed in the exercise of those powers, the case is different. Take, for instance, the case of a tenant for life. He has no power to grant a lease, and if he does execute one for a longer period than his life it is void for the excess. But where power is given to a tenant for life to execute a lease for a longer period than his life—say 200 years—it is good, because although it exceeds the duration of his power, the person who gave the power intended that he might execute such a lease. So although the Legislative Council was only to continue for a limited period, it possessed power to legislate for a longer period than its own session, in fact, for an unlimited period. If this were not so the proviso would be construed as if it conferred only power to make laws for the short time in which it existed. The distinction, I think, is clear between a body whose duration and powers are both unlimited, and one which is limited as to duration but unlimited as to power.

The next objection is that the Act 18 Vic., No. 3, does not apply to the case of the present defendant. A passage has been cited from *Plowden* to the effect that to ascertain the intention of the Legislature we may look at the circumstances existing at the time the Act was passed, and that the Legislature intended that these Acts should only apply to conditionally pardoned men.

Now, there is no sound distinction between the case of conditionally, and that of absolutely, pardoned men, so far as this objection is concerned. A conditional pardon is an absolute pardon subject to a defeasance. All the Acts on this subject were pointed at the introduction of persons bearing conditional pardons. This was expressed distinctly in the previous Acts, for the enactment was wholly unnecessary as regards those whose sentences had not expired; they could be dealt with in another mode, and be sent back to the country from which they escaped. The proviso that the Act should not apply to persons whose sentences had expired three years prior to their arrival here has been relied on for the Defendant, and it is said that the Act only applied to persons whose sentences had not so expired. It is, however, trifling with legislation to hold that view. The words used in the Act are descriptive—they apply to every class of felons and every condition—not to those whose sentences had expired, but to those whose sentences had not expired, and whose sentences were limited in any way.

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It is next said that the Act does not create any offence; it contains a penalty, and that penalty would alone constitute an offence. Certain persons suspected are to be arrested. What are they suspected of? Of having come into Victoria, having previously been found guilty of a felony. If he is suspected, he may be found guilty. Of what? Of that of which he is suspected—namely, having come to Victoria, having been so found guilty. There may have been reasons why Parliament was not more explicit in describing the offence. It may have been that they desired to avoid the use of any offensive expression, but it is plain that the Act created an offence.

It is next said that there is no proof against this Defendant. The Act directs that persons not lawfully resident in Victoria may be arrested and examined. The proof that a person was not lawfully arrested is the proof

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of a negative—it is the proof too of facts which are essentially and peculiarly within the defendant's knowledge—and in addition the Justices of the Peace Act casts the onus in such cases on the Defendant, and not on the prosecution. Besides, sec. 11 of 18 Vic., No. 3, meets this case. Certain proof is there stated as being *prima facie* evidence of the coming into Victoria, which must mean coming for the first time—not as an old resident returning—and that proof has been given.

We now come to the last objection, that relating to the prerogative. It is said that the Act interferes with the Royal prerogative. To that several answers have been given during the argument. One is, that the Act is descriptive merely as regards the persons who are to be affected by it. It only describes a fact, just as if it referred to persons born in a particular country, or marked in a particular manner. It simply says that persons found guilty of a felony cannot come here. The pardon cannot obliterate that fact, although it may remove the effects of the conviction. So it may be libellous to say that a person is a thief who has been tried and found guilty of a larceny, and pardoned; but it would not be libellous to say that he had been found guilty of it. A pardon relates to past offences, not to future; and the offence in this instance was subsequent to the pardon. Giving, however, the fullest force to the effect of the pardon, in this instance the prerogative of the Crown is subject to the enactment of the Legislature. The Crown, as one of the three branches of the Legislature necessary to pass this Act, has assented to its being passed. The two previous laws on the subject contained a clause saving the Royal prerogative, and this clause is omitted from the present Act, although the subject matter is certainly as large as in those preceding. As there was therefore as great a necessity in this, as in the others for this saving clause, and as it is absent in this, we are at liberty to say that it was intentionally omitted. It may,

therefore, be put simply as a tripartite contract entered into between three persons, and which no one of these three persons could be allowed in a court of law to evade. It would be but little short of the offence for which this person has been found guilty, to say that the Crown would be at liberty to pursue such a course.

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Giving, then, the fullest force to the pardon, the Crown having assented to an Act which might possibly interfere indirectly with the effect of the Royal prerogative, it is to be apprehended that it consented to the exercise of the Royal prerogative subject to that Act; otherwise it would really amount to this, that the Crown, having solemnly assented to an Act, determined, by the exercise of its prerogative, to render it nugatory. It is impossible to suppose such an occurrence. We are, therefore, bound to assume that by assenting to the Act the Royal prerogative was to be exercised, subject to the provisions of the Act so assented to. The authority in 5 *Espinasse, Dover v. Maestaer*, is conclusive on the point. It may be that the prerogative can only be taken away by express words; yet it can be affected by the fair and necessary intendment from an Act. The Crown is at liberty to refuse its assent to a measure that may interfere, not merely to one that must interfere, with the prerogative; and as this Act applies not merely to expirees, but to conditionally and to absolutely pardoned men, it might so interfere, and the Crown might have refused its assent. But it did assent; and the sound conclusion is, that in assenting to it the Crown expressed an intention that the Royal prerogative should be exercised subject to it. It is said that this construction would put a pardoned man in a worse position than an expiree. Perhaps so. But we cannot entertain such an objection. A person who takes a pardon takes it subject to all consequences and limitations. We think none of these objections have been sustained, and that the justices were right.

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BARRY, J.—I concur completely in the observations of the learned Chief Justice, and I do not propose to go over the whole case, but I wish to make one or two observations. It is contended that the Legislature that was in existence at the time this Act was passed had no power to legislate beyond the period of its own existence. The 40th section of the "*Constitution Act*" provided for the continuation of the then existing laws, and it is said that no provision was made to continue laws passed between that date and the time when the writs for the new Parliament were issued. This argument derives whatever force it possesses from the fact that section 27 makes it imperative on the Legislature then existing to make laws for the necessary compilation and revision of the electoral lists for the new House; and there is no enactment that laws passed in the interval between the proclamation of the "*Constitution Statute*" and the assembling of the new Parliament should exist beyond that session. I think the argument is a mere fallacy, and that it is only necessary to state it to show its fallacy.

The other point to which I shall allude is that relating to the Queen's pardon. I think that no answer has been given to the case of *Dover v. Maestaer*. It is true that it is only a *nisi prius* case, but there is abundant authority to show that the remarks of Lord *Ellenborough* in deciding that case were good law. The observations of Lord *Coke*, in 2 Inst. 368; and of Lord *Holt*, in *Rex v. Crosbie*, shew that the King's pardon cannot get rid of disabilities imposed by statute. This Act 18 Vic., No. 3, is the third enactment on the subject of the influx of criminals. The first was passed in 16 Vic., and the matter was referred home. The nature of the legislation was so different from anything affecting the other portions of Her Majesty's dominions that for some reasons it did not become law. It was re-enacted in nearly similar words, and again sent home. The law officers who advised the Colonial Office were vigilant, if not jealous, for

the Royal prerogative, and were disinclined to its becoming law; but they were disinclined to reject it, and it was therefore allowed to pass. No objection was then taken to the inability of the Legislature to pass such a law, and if such a disability existed there is reason to believe it would have been pointed out. Since then the Act has been passed again and again.

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It is therefore part of the law of the British empire—different indeed from what exists in other parts of the empire—and subject to this law the Royal pardons must be issued. If a person disregard the legislative prohibition which the Queen has assented to, and labours under the disability referred to in this Act, he comes here bearing a pardon giving him emancipation in any other part of the globe but this country. He takes the pardon subject to the contract between the Queen and the Parliament and to his inability to come here.

WILLIAMS, J., concurred.

Conviction affirmed.

GILMER v. BURMISTER.

MOLESWORTH moved for a rule *nisi* for a writ of *certiorari* to remove a case from the County Court at Hepburn, to the Supreme Court; on the ground that a number of difficult questions of law were involved.

September 6.

Application for *certiorari* to remove a case from the County Court should be made to a Judge in Chambers.

PER CURIAM.—The application should be made to a Judge in Chambers.

Rule refused.

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In altering the level of a street within a borough, where that level has not been previously fixed, it is necessary for the Borough Council to make an order, and give notice &c., in the manner provided by the Act No. 184, ss. 250 *et seq.*

HOLMES v. THE MAYOR, COUNCILLORS, AND
BURGESSES OF THE BOROUGH OF BALLARAT.

DEMURRER to replication.

Declaration—That Plaintiff was possessed of a certain house and premises adjoining a certain street in the Borough of Ballarat called Webster-street and Defendants wrongfully and injuriously caused a portion of the said street adjoining Plaintiff's said house garden and premises to be banked up raised and elevated to a height and level exceeding the previous and accustomed height and level of the said street and the level of the Plaintiff's said house and premises and a certain other portion of said street to be cut down to a level lower than the previous and accustomed level of the said street and thereby obstructed the entrance from said street to Plaintiff's premises and to a right-of-way and did other damage alleged which greatly deteriorated the value of Plaintiff's property The second count charged a similar trespass to other lands and houses of the Plaintiff in the possession of his tenants.

Pleas—1st Leave and licence 2nd That the Borough of Ballarat was a borough named in the schedule to the Act No. 184 and the Council of the said borough for the purpose of making good and improving the said street raised lowered and altered the soil thereof as they lawfully might for the cause aforesaid the level of the said street not having been previously fixed as in said Act provided.

Replication to second plea—That the Council did not before commencing the works make an order directing the work to be executed and did not cause any such order together with plans &c. to be transmitted to the Board of Land and Works and said Board did not confirm any such order of the Council.

Demurrer—For that until the levels have been fixed the surface of any street may be lawfully raised or lowered without any such order plans &c. as in the replication mentioned.

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Fellows for the Demurrer.—Section 263 of No. 184 gives the Council power to repair streets, and the proviso to that section is, "Provided that the ground "or soil of any street the level of which has been "previously fixed as hereinafter provided shall not be "raised or altered save so as to conform to such level." The level of this street had not been previously fixed, and therefore that proviso did not apply. Nor is this section controlled by section 249 and the following clauses relating to public works, for they only relate to new streets, not to existing ones. *Lavezzolo v. The Mayor, &c., of Daylesford (n)*.

Higinbotham for the Plaintiff *contra*.—That case merely decides that the Council has the power of lowering streets without fixing the level, under section 281. But under section 249 and the following clauses, provision is made for compensating parties whose property is injured by the exercise of the powers under 263. By this last-mentioned clause, the Council can make any repairs they please, provided they conform to the existing levels, or, if the level be not fixed, subject to the provisions for compensation conferred by section 249 and the following ones. Section 278 and those following, clearly refer to private streets, and do not therefore bear on the question.

Cur. adv. vult.

STAWELL, C. J.—The principal question in this case is, whether in altering the level of a street, where that level has not been previously fixed, it is necessary for the Borough Council to give notice in the *Government Gazette*

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(n) *Ante*, Vol. I., Eq., 113.

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in the manner prescribed by the Act, and thus give the Board of Land and Works power to interfere in the event of a dispute between the municipal authorities and the inhabitants who complain of their intended acts. The Defendants rely upon section 263 of the Act No. 184, which enables the Council of every borough, *inter alia*, "to raise, lower, and alter, in such manner, and with such materials as they may think fit, the ground or soil of any street under their management Provided that the ground or soil of any street whereof the level has previously been fixed shall not be raised or altered save so as to conform to such level." It is said that this section applies to old as well as new streets, and that the Corporation may alter levels as they think fit, without giving notice in the *Gazette*. This is the only section that enables the Corporation to alter levels; and we think the section, as it purports, extends to any street—new and old. The Defendants contend the power thus conferred may be exercised without any compliance with the requirements of section 250. They say that the meaning of the words "whereof the level has been fixed," in that clause, is, whereof the levels could have been fixed, and as the levels of old streets could not have been fixed, the clause merely applies to new streets. Where the Legislature meant new streets they said so. The Councils have, by section 261, power to open or make new streets, and divert, alter, or increase the width of any street under their care; and section 263 gives them the power to raise, lower, or alter the soil of any street where the level has not been fixed. The allowing a power of appeal by any one aggrieved by fixing the levels of new streets, shews that Parliament did not intend to give the Councils unrestricted power in dealing with such streets; but if any provision were necessary to restrict the power of the Council, that restriction is more urgently required in the case of old than of new streets; for in the former the existing levels have been acted upon, and premises built upon the faith of their continuing, and it is not to be

supposed that the Legislature would lightly allow Councils, unadvisedly it might be, to raise and alter the level of streets, thereby destroying the property which had been erected, and that without giving any compensation to the owners, when they have granted a right of appeal by any person feeling aggrieved by fixing the levels of new streets, in which it is unlikely that valuable buildings have been erected. We think that different modes of restraining the Council from injuring private individuals has been provided in the case of new and of old streets; in the one there is an appeal to the General Sessions; in the other there is a reference to the Board of Land and Works. The Defendant endeavours to avoid that reference, which we think is contrary to the Act. Our judgment will be for the Plaintiff.

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GOLDSBROUGH AND ANOTHER v. FLETCHER.

DEMURRER to replication

Declaration for taking and impounding sheep of Plaintiffs'.

Pleas:—*inter alia*, "That Defendant was manager of the Faraday Farmers' Common, which common was duly proclaimed under the 'Land Act 1862,' and was in lawful possession of said common as such manager, and the sheep being wrongfully on the said common he seized and impounded them."

Replication:—"That a public thoroughfare passed through the said land (such land not being then enclosed), and Plaintiffs' servants having the custody of the said sheep, and driving the same, stopped upon the said land during one day for necessary rest, said sheep not being at a

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Managers of a common are not the "occupiers," but are the owners under the "Pounds' Statute;" and as such do not come within the proviso to section 32 of that Act, and are entitled to impound travelling stock upon the common, and within half a mile of a public thoroughfare.

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greater distance from the thoroughfare than half a mile, and not being affected with catarrh or scab." Demurrer.

M'Farland for the demurrer.—By section 48 of the "*Land Act 1865*," managers of commons have power to distrain cattle, sheep, or goats, trespassing; and they are to be held to be owners within the "*Pounds' Statute*." Clause 32 of the "*Pounds' Statute*" provides that any person "in occupation of land by lease, license, or other authority, by or on behalf of the Crown," may impound cattle trespassing. But there is a proviso that a person so occupying land through which a public road or thoroughfare passes, such land not being enclosed, shall not impound cattle of any person travelling along such road, or which may stop on such land during one day and night for necessary rest. A manager of a common does not come within the proviso to section 32. He is not in occupation under a lease, license, or other authority by the Crown. The authority of the manager is derived from section 48 of the "*Land Act*:" *Douglas v. Reynolds* (o).

Fellows contra.—Managers are occupiers under section 32 of the "*Pounds' Statute*." It is necessary that they should be owners in order to impound; but they are owners under the description given by that clause—as occupying by lease, license, or other authority. They have no lease, or license, but they have other authority. The authority need not be from the Crown, for what other authority from the Crown could there be but a lease or license? Therefore, "other authority" may include an Act of Parliament: *Wadham v. Marlow* (p).

M'Farland in reply.

Cur. adv. vult.

(o) 2 W. & W., Law 1.

(p) 2 Chitt. Rep., 600.

STAWELL, C. J.—The “*Land Act 1862*,” 25 *Vic.*, No. 145, sec. 18, enacts that every traveller may, while he is travelling, depasture, for any period not exceeding twenty-four hours, his cattle and sheep, unless the same be affected with any infectious or contagious disease, upon any unsold Crown lands within *one quarter of a mile* on either side of any road or track, commonly used as a thoroughfare, whether such Crown lands form a common or not. The 48th section of the “*Land Act 1865*,” No. 237, enables managers of commons, during the continuance of their management, to distrain cattle, sheep, or goats trespassing on the common, and enacts that they shall be taken to be owners of the common within the meaning of any Act, then or thereafter to be in force, relating to the impounding of cattle. What the object of these latter words may have been is not very obvious. The Plaintiffs contend that this portion of the clause is to be considered as restraining the managers from impounding travelling stock, as prohibited by the “*Impounding Act*,” the clause of that Act, in the same way as the 18th of the “*Land Act 1862*,” enabling travellers to travel stock, if not diseased, and if within *half a mile* on either side of any road, &c., and prohibiting any person occupying any waste lands under lease, license, or other authority, from impounding such stock. They rely on this argument: The “*Land Act 1865*,” declares that managers of commons are to be considered as the owners of the land; and in the interpretation clause of the “*Pounds’ Statute*,” the terms “owner” and “occupier” of any lands are defined, for the purposes of that Act, to include any person occupying any waste lands belonging to the Crown under any lease, license, or other authority. The Plaintiffs urge that the words “owner” and “occupier” including any person so occupying waste Crown lands, are not merely convertible terms, but also that any person occupying, &c., is convertible with either “owner” or “occupier;” “occupier” meant “owner,” and “owner” meant “occupier,” and

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any person occupying, &c., meant "owner." It is manifest, however, that an owner is not necessarily an occupier, and certainly every occupier is not an owner; nor because one word is to include a particular description, does it follow that that description is to include the word.

We think the construction of the Act is this:—That certain powers were conferred upon "owner" when that term was used, and upon "occupier" when that term was used; but where neither term is used the interpretation clause is inapplicable. Where plain words are used we are bound to attach a meaning to them, and we agree with the Defendant that the managers of a common are not the occupiers, but are the owners under the "*Pounds' Statute*" solely by force of the "*Land Act*." The persons who depasture on the common are the occupiers. As provision has been made by the "*Land Act 1862*," for cases like the present, it is difficult to see how it could have been intended to repeal that provision by a remote implication, and in a clause of the "*Land Act*," apparently conferring powers on the managers of commons which they did not possess, to restrain those managers from impounding cattle trespassing to a greater extent than the "*Land Act*" already restrained them. We think the Defendant is entitled to our judgment.

Judgment for the Defendant.

REGINA v. CALL Ex PARTE GILLOW.

September 8.

It is not necessary that the attorney-at-law of a corporate Plaintiff should prove any retainer under the corporate seal.

DUIGAN moved for a rule *nisi* for a writ of prohibition, to restrain the justices at Melbourne from enforcing an order against *Gillow*. The Defendant was sued by the Maritime General Credit and Discount Company, Limited, incorporated under the Act No. 190, and prohibition was now applied for on the ground that the attorney by whom

the company was represented in the Police Court did not prove any retainer under its corporate seal. *Grant on Corporations*, 100, *Arnold v. The Mayor of Poole* (q).

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STAWELL, C. J.—I do not think this is an objection of which a third person can avail himself; it is one as between the attorney and the company. On the confidence which must exist between a Court and those practising in it, we are bound to assume that when a professional gentleman says he appears on behalf of certain persons, he is properly authorised.

Rule refused.

(q) 2 Dowl., P.C., 598.

RE H. H. HOSKINS EX PARTE BEVAN.

September 9.

C. A. SMYTH moved to make an order of Mr. Justice *Molesworth* for the delivery of a bill of costs in an equity matter a rule of court.

Where a Judge's order in proceedings in Equity, is sought to be made a rule of Court, the application should be made to the Equity Court.

PER CURIAM.—As the order was made in proceedings in Equity the application ought to be made to the Equity Court.

Rule refused.

1869.

September 13.

Where an order for winding-up a mining company did not shew jurisdiction on the face of it,

Held, that it might be treated as a nullity, and a second order to wind-up the company be made without the first being set aside.

BEEVES, APPELLANT, v. BOWDEN, RESPONDENT.

SPECIAL case by way of appeal from petty sessions, Ballarat.

The Defendant was sued as a shareholder in the Reward Gold Mining Company for £150, contribution due to *Reeves*, the Official Agent, on 100 shares in the company. The company was registered under Act No. 228, in May, 1865. On 14th December, 1865, *George Polwarth*, a creditor of the company, lodged a petition in the Court of Mines, Ballarat, for the winding-up of the company, and, on 8th January, 1866, an order was made for winding up the company. This order was assumed to be bad, as it did not show jurisdiction on the face of it. In June, 1869, *John Halligan*, another creditor of the company, presented a petition to the Court of Mines for the winding-up of the company, and obtained a winding-up order, under which these proceedings were instituted against *Bowden*. It was contended on behalf of the Defendant that the order of the 8th January, 1866, was valid, and the order of June, 1869, consequently invalid; or if the prior order was invalid, then that it should have been set aside before the subsequent order was made.

The magistrates dismissed the case, and Plaintiff appealed.

Fellows for the Appellant. The second winding-up order was a good one. The first order was defective, as it showed no jurisdiction, and a valid winding-up order might therefore be made, the first being a nullity. *Reg. v. Brisby* (r).

Billing for the Respondent. The case cited was one before justices, and there the justices did all they could to

(r) 1 Den., Cr. C., 416.

get rid of the first order before making a second. Orders in the Courts of Mines are similar to decrees in Equity, and cannot be treated as nullities. *Ex parte Oakes* (s). The second order could not be made while the first existed, otherwise all the creditors might apply for winding-up orders. The proper course to have pursued was for the creditors to have applied for a good order under the first petition. The second winding-up order was bad, having been based on a petition reciting a debt of £21 due to Petitioner, and ordered by justices to be paid, while the justices have only jurisdiction to the extent of £20 in cases of debt.

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BOWDEN.

Hellows in reply. It appears by the proceedings that the debt was for wages, and the "*Master and Servants Act*," gives jurisdiction in cases of wages to the amount of £50.

STAWELL, C. J.—The first order in this case was bad on the face of it; there is nothing to set aside, and the second petitioner was justified in treating it as a nullity. We think the second order good; it refers to a debt, which may be good or bad, but which we are not to assume was bad. The Defendant is still a shareholder of the company, and liable for contribution.

Appeal allowed, with costs.

1869.

September 13.

At a toll-gate the tolls payable were

"For every gig chaise coach chariot or other such carriage constructed on springs if drawn by one horse or other animal 6d. For every cart dray waggon wain or other such vehicle if drawn by one horse or other animal 1s."

Held, that an American express waggon, used by a store-keeper for the purposes of his trade, but suitable for carrying passengers, was liable only to the lower toll.

CBOLL v. LINTON.

SPECIAL case by way of appeal from Petty Sessions, Sebastopol.

Defendant, a toll-keeper at Cambrian Hill, was summoned and fined for demanding a toll for a waggon on springs in excess of the legal amount.

The Defendant was toll collector at the Cambrian Hill toll-gate, at which the tolls payable were *inter alia* as follows:—"For every gig chaise coach chariot or other such carriage constructed on springs if drawn by one horse or other animal 6d. For every cart dray waggon wain or other such vehicle if drawn by one horse or other animal 1s." The complainant was in the employ of one *Luth*, storekeeper, at Sebastopol. The waggon in question (an American express waggon) the property of *Luth*, and used by him for the purposes of his trade, was a vehicle of a light description, constructed on springs, and capable of carrying from ten to thirty hundredweight of goods if required—was suitable for carrying passengers, and was drawn at a trot. It was proved that the waggon was not used for the conveyance of passengers for hire; but that similar waggons were used for carrying passengers. The Defendant demanded from the complainant 1s. as toll. The Complainant tendered 6d., but the Defendant refused to receive it, and obstructed and hindered the Complainant from passing through the toll-gate. It was contended, on the part of the Defendant, that the first portion of the table of tolls, "for every gig chaise coach chariot or other such carriage constructed on springs" was applicable to carriages for the conveyance of persons; the second portion, "for every cart dray waggon wain or other such vehicle" being applicable to vehicles for the conveyance of goods;

and that the waggon in question was chargeable under the second portion. The Complainant contended that the amount of toll was to be ascertained by the construction of the vehicle, and the Court had to determine the toll payable from the description of the vehicle. The magistrate was of opinion that the question of toll payable for such vehicles was a matter of fact for determination, and held that the waggon was chargeable under the first portion of the table of tolls.

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v.
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Mackay, for the Plaintiff, cited *Broom's Maxims*, p. 4, *Layard v. Ovey* (†).

Fellows for the Defendant. The question is what the vehicle was used for, whether for goods or passengers, and it does not matter whether it was on springs or not. This waggon was clearly for the carriage of goods, and should pay toll as such.

PER CURIAM.—The cart was for the conveyance of passengers, should come under the first class, and pay the lower toll.

Appeal dismissed.

(†) L. R., 3 Q. B., 415.

REGINA v. ODDIE.

RULE nisi to oust *T. B. Oddie* from office as councillor of the shire of Ripon.

September 13.

At the last annual election for one division of the shire there were two candidates, *T. B. Oddie* and *James Greig*,

Below the signatures of the ratepayers to the nomination paper of a candidate for election as a shire councillor, were the

words "And I the above-named *James Greig* hereby consent to such nomination." This was not signed, but the words "*James Greig*" were written by that candidate.

Held, that this was a sufficient signature by the candidate within the Act No. 176, sec. 84.

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the present relator. The nomination paper of *Greig* was signed by ten ratepayers. Below the names of the ratepayers were the words—"And I the above-named *James Greig* hereby consent to such nomination." This was not signed, but the words "*James Greig*" were written by that candidate. The returning officer at first accepted the nomination-paper, and advertised that a poll would be taken. Subsequently, on taking legal advice, he changed his opinion, held that the nomination-paper of *Greig* was invalid, and declared *Oddie* duly elected.

Higinbotham shewed cause. Section 84 of the "*Local Government Act*," No. 176, contemplates the signature of the candidate being written below his consent. In the form given for the nomination a blank is left for the signature. Strict accuracy is necessary in nomination papers—stricter even than in voting papers. *Regina v. Tugwell* (v). The question is whether the party intended to sign—*Queen v. Tart* (w)—and can the Court, looking at this nomination-paper, say that *Greig* intended to sign.

Fellows in support of the rule. It is not necessary that a signature should be on any particular part of the paper—it may be at the bottom or at the top. *Knight v. Crockford* (x), *Lemayne v. Stanley* (y).

STAWELL, C. J.—The question is, whether the person intended to sign the paper; and the object of giving the nomination-paper—of writing the words at all, is not very apparent, unless they were intended as a signature. If the returning officer had any doubt about the matter, he should have satisfied himself on the subject by inquiries. He received the paper, accepted it, and published the name; but unfortunately, he subsequently determined to treat the nomination as void, forgetting that he is simply a ministerial officer.

Rule absolute to oust from office, with costs.

(v) L. R., 3 Q. B., 704.
(w) 28 L. J., Q. B., 173.

(x) 1 Esp., 90.
(y) 3 Lev., 1.

ANDREWS v. TAYLOR.

1869.

Sept. 8, 14.

EJECTMENT to recover possession of land at Yarra-ville. In March, 1854, *John Hurry* sold to the Plaintiff the land in question for £61 12s., and in April, 1854, *Hurry* conveyed the land by deed to Plaintiff. This deed was not registered till August, 1867. In April, 1856, *Hurry* became insolvent, and *H. S. Shaw* was appointed his official assignee. In May, 1856, *Shaw* sold and conveyed this same land to *Archibald Adam*. In March, 1857, *Adam* sold and conveyed to *Taylor*. Both these conveyances were registered prior to August, 1867. At the trial the Defendant contended that his deed being registered before Plaintiff's gave him a prior title. The jury found for the Plaintiff. A rule *nisi* to enter a verdict for the Defendant was subsequently obtained pursuant to leave reserved.

A, sold and conveyed land to *B*. Subsequently *A* became insolvent, and his official assignee sold and conveyed the same land to *C*. The conveyance to *C* was registered prior to the conveyance to *B*.

Held, that *A* having, prior to his insolvency, conveyed the legal estate to *B*, the subsequent conveyance by *A*'s official assignee to *C* was inoperative, and acquired no validity by its prior registration.

Bunny, for the Plaintiff, showed cause. The Defendant's deed has not priority over Plaintiff's from the mere fact of its being registered first. If the Defendant had a registered conveyance from the same person as the Plaintiff claimed title from, then his conveyance might have priority. But his deed was from a mere stranger, who had no right whatever to the land; for, in 1854, before the insolvency, *Hurry* had conveyed the legal estate in the land to Plaintiff. *Warburton v. Loveland* (2), 5 Vic., No. 21, sec. 11, *Renwick v. Armstrong* (a), *Fury v. Smith* (b).

Molesworth in support of the rule. The effect of the "Registration Acts" is to give to the deed first registered priority over subsequently registered deeds, no matter by whom executed. The Plaintiff did not prove any seisin or ownership by *Hurry* before he conveyed. *Hurry* only was

(c) 2 Dow. & Cl., 480.
(a) 1 Hud. & B., 727.

(b) 1 Hud. & B., 735.

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called, who said he was the owner of the land, but the chain of title was not deduced from the Crown grant downwards. *Fuller v. Goodwin* (c), *Richards v. Richards* (d).

Our. adv. cult.

September 4.

STAWELL, C. J. — Rule *nisi* to enter a verdict for Defendant, pursuant to leave reserved. The Plaintiff at the trial proved the due execution of a conveyance from *Hurry* to him in April, 1854. He proved no possession or occupation by *Hurry* — merely a statement that he was the owner. In 1856, *Hurry* became insolvent, and subsequently the assignee sold to *Adam*. The Plaintiff's case rested there. The Defendant produced a conveyance from *Adam* to him, and contended that this conveyance having been registered before that to the Plaintiff, he was entitled to a verdict by virtue of the prior registration. Supposing that there was any proof of the conveyance by *Shaw* to *Adam*, which is at least doubtful, there is nothing to show that *Shaw* had any interest in the land. *Hurry*, the insolvent, had previously sold the same land, and executed a conveyance of it, and so far at least as the legal estate was concerned, all interest had passed out of him. *Adam*, through whom the Defendant claims, was therefore a perfect stranger. Now, the intention of the "*Registration Acts*" is to give priority to the registered owner over the unregistered owner; in other words, in the case of two conveyances, either of which would be valid if the other was removed, to give, by virtue of the registration of one of them, priority to it over the unregistered conveyance. As far as *Taylor* is concerned, he is a perfect stranger. Had the Defendant, at the end of the Plaintiff's case, moved for a nonsuit and called no evidence, it might have been difficult to maintain the verdict, inasmuch as *Hurry* gave no

(c) 4 W. & P.; N.S.W. Rep., 66. (d) 15 East., 294 a.

evidence of seisin. The Defendant, however, went into evidence, and endeavoured to prove title deduced from *Hurry*. By adopting that course—the only one, indeed, open to him—he cured the defect in the Plaintiff's case.

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 v.
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Rule discharged.

CHISHOLM v. CAPPER.

EJECTMENT. The Plaintiff's title was a certificate under the "*Transfer of Land Statute*." At the trial, the Defendant gave evidence in support of a title by adverse possession. It was proved that in 1841, a person assuming to act as owner of the land had given it to the Defendant in satisfaction of a debt, and that the Defendant had then fenced it in. The Defendant went to look at the fencing occasionally, but had exercised no other right of property over the land up to the time of his becoming insolvent in 1847. After his insolvency the Defendant occasionally visited the land. In 1851, nearly all the fencing put up by the Defendant had been removed, but one or two posts of the original fence were standing when the action was brought. About five years before action, the Defendant had been rated for the land; and about three years before action he had paid the rates, evicted a person in possession, and had since occupied the land, and was in possession when the Plaintiff obtained his certificate of title. The above were the only acts of possession proved by the Defendant. The Plaintiff submitted that there was no evidence of adverse possession to go to the jury, as there

Sept. 10, 14.

Defendant in ejectment relied on adverse possession. It was proved that in 1841 a person acting as owner of the land gave it in satisfaction of a debt to Defendant, who then fenced it. In 1847 Defendant became insolvent, but beyond occasionally visiting the land, both before and after his insolvency, exercised no right of ownership. In 1851 nearly all the fencing had been removed, but one or two of the original posts were

standing when the action was brought. About five years before action Defendant was rated for the land, and about three years before action paid the rates, evicted a person then in possession, and himself continued in possession. A verdict having been found for the Defendant,

Held, that the evidence was not sufficient to maintain the verdict.

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had been no actual possession by the Defendant for the statutory period; and the acts relied upon after the insolvency could not be connected with the acts before the insolvency, as done under one title or in the same right. The case was sent to the jury, who found a verdict for the Defendant. A rule for a new trial was obtained, on the grounds of misdirection and verdict against evidence.

Fellows shewed cause. Possession may gain a title which will be an answer to any proof of title by deeds or by certificate under the statute. The acts of possession were all that the circumstances require. There was no disturbance of the Defendant's possession, and he was not obliged to remain upon the land to keep it. Nothing passed to his official assignee, as the title by possession had not matured when he became insolvent. The matter was properly left to the jury as one in which the frequency and character of the Defendant's acts were to be considered in determining whether or not he had been in possession.

T. a'Beckett for the rule. To bar the Plaintiff under the "*Statute of Limitations*" it is not enough to show that the Plaintiff was out of possession, some other person must have been in actual possession. *Carter v. Barnard* (e), *Smith v. Lloyd* (f), *McDonnell v. McKinty* (g), *Tottenham v. Byrne* (h). Constructive possession is not enough. Unless the acts of possession have been inconsistent with the existence of the Plaintiff's rights they cannot defeat his title. The principle of the "*Statute of Limitations*" is that laches in asserting title may cause loss of title, but there can be no laches until there is something to show an interference with the Plaintiff's rights. The acts of possession relied upon in this case are so slight that no title would be safe if they were accepted as sufficient. An interest by possession though not matured, passes by the same means

(e) 13 Q. B., 945.
 (f) 9 Ex., 562.

(g) 10 Ir., L.R., 514.
 (h) 12 Ib., 376.

as a legal interest—by descent, devise, or conveyance—and would pass on insolvency. *Dixon v. Gayfere (j)*, *Asher v. Whitlock (k)*. Whatever interest *Capper* had acquired by fencing the land must therefore have passed to his official assignee, and acts done by *Capper* after his insolvency cannot be attributed to his former title, and are as immaterial as if they had been the acts of another. The only substantial acts of possession proved were the fencing in 1841, and occupation taken in 1866; but these acts are unconnected, and there has been no actual possession in the interval.

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Cur. adv. vult.

STAWELL, C. J.—We think that there should be a new trial in this case, as the evidence was not sufficient to maintain the verdict. No costs of former trial.

September 14.

(j) 17 Beav., 421.

(k) L.R., 1 Q.B., 1.

MAGUIRE v. DIXON.

September 11.
October 4.

TRESPASS for the illegal seizure of a number of sheep. There was also a second count in trover for the wrongful conversion of the sheep. Pleas—1st, “Not guilty;” 2nd, to the 1st count, “Not guilty, by statute 11, *Geo. II.*, cap. xix., secs. 19 and 21, and ‘*Landlord and Tenant Statute*, 1864,’ sec. 87;” 3rd, to 2nd count, “Not possessed.”

Where sheep or cattle, by default of their owner, stray upon unenclosed land, they may be immediately distrained for rent in arrear.

The Defendant, an auctioneer at Gisborne, had on behalf of the owner of some land occupied by a person named *Stevens*, put in a distraint for rent on the 10th June. The Plaintiff, on 9th June, had turned about forty sheep out on the common, and these sheep in the course of the night, through a defect in the fence, got into *Stevens*’ land.

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They were seized under the distress for rent, and having been kept three days, were returned to the Plaintiff, in order to save trouble. The jury returned a verdict for Plaintiff, damages 40s. The Defendant obtained a rule nisi, pursuant to leave reserved, to enter a verdict for him.

Billing now shewed cause. The sheep entered the land through a defect in the fences. Either the landlord or his tenant was bound to keep the fences in repair, and as neither of them did so, the Defendant could not seize the sheep either until he had given the Plaintiff notice to remove them, or until they were twenty-four hours on the ground. *Brook's Abr. Title, Distress*, 66; *Kent's Commentaries*, 643; *Kemp v. Crews* (l); *Jordan v. Martin* (m); *Goodwyn v. Okevely* (n); *Poole v. Longueville* (o); 3 *Stephen's Comm.*, 5th ed., 359.

Fellows in support of the rule. There is no obligation in law for the landlord or his tenant to fence as against all the world. The obligation, if it exist at all, is to fence as against the owner of adjoining land. If cattle travelling along a highway trespass on unfenced ground they may not be liable to seizure, but the case is widely different where the owner of the cattle is in the wrong, as in this case, by turning his sheep out without anyone to watch them. As he had done the wrong in the first instance, he was not entitled to any notice. *Dovaston v. Payne* (p), *Ricketts v. East India Dock Company* (q), *Singleton v. Williamson* (r), *Leigh v. Riley* (s), *Russell v. Shenston* (t).

Our. adv. vult.

October 4.

STAWELL, C. J.—Trespass for seizing and taking sheep. The Plaintiff, who was the owner of the sheep seized, had turned them out on an unenclosed common, without

- (l) 1 Lord Raym, 170.
- (m) 1 Mod., 68.
- (n) 4 H. & N., 631.
- (o) 2 Saund., 282.
- (p) 2 Sm. L. C., 113.

- (q) 12 C. B., 160.
- (r) 7 H. & N., 410.
- (s) 3 Q. B., 134.
- (t) 14 C. B., 213.

any person in charge of them. They strayed from that common, and went upon other land, also unenclosed; and during the same day the Defendant, as agent for the owner of the land, seized them as a distress for rent. For that seizure the present action was brought. The Plaintiff contended that before the sheep could be seized for distress they must have been, in the old law French, *levant* and *couchant*—that is, a day and a night on the ground. The Defendant, on the other hand, contended that the simple question was who was to blame in the first instance; that owners of land in this colony were not obliged to fence, as by custom they are in many instances in England; and if the owner of stock of any kind by his own carelessness allowed it to escape upon another person's ground, that person was entitled to distrain it at once, either for *damage feasant* or for rent. There is no doubt that in a case of *damage feasant* the simple question is who is to blame. That has been decided over and over again. But, as regards distress for rent in arrear, the cases are not so distinct. The case of *Kemp v. Crews* (v) is, however, we think, sufficiently decisive upon the point. That case is in effect, that in case of distress for rent service where cattle stray upon land through the default of their owner, they can be immediately seized. Now, there is no distinction as regards this point between rent service and rent in arrear. If, therefore, stock comes, either by default of the owner or with his consent, on the land of another, it is not necessary that they should be on the ground *levant* and *couchant*. They may be distrained at once. If they came on the ground by accident, that is to say if the land being enclosed the fences were suddenly broken down, the matter would be different. Here it is admitted that the sheep were placed on an unenclosed common with no one in charge. They strayed upon the unenclosed land, and we think the Defendant was justified in enforcing his rights by a levy. The rule will therefore be absolute to enter a verdict for the Defendant.

(v) 1 Lord Raym, 170.

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BARRY, J.—It appeared to me at first sight to be pushing a right of feudal origin to an extreme extent in a country so recently peopled as this, if we held that the Defendant was entitled to recover. But when we examine the principle on which this right has been adopted and carried out in America, it does not appear so unreasonable after all. Conceding that there is no obligation upon any person to enclose his land and crops here any more than in England, we have then to examine the nature and character of the chattels seized in this case. They were sheep, without any person in charge of them—animals of vagrant propensities, and liable to stray upon the lands of other persons than their owner, and also likely to injure the land and crops of the persons on whose ground they strayed. They were in consequence liable to be seized for *damage feasant*. I think they might also be seized for rent due by the tenant of the soil into which they had been allowed to stray. If there be any hardship, the Plaintiff is the author of it himself, as he did not bestow proper attention in keeping his sheep within bounds.

WILLIAMS, J., concurred.

Rule absolute.

BARFOLD ESTATE GOLD MINING COMPANY
REGISTERED *v.* KLINGENDER.

1869.

September 14.
October 4.

SPECIAL case by way of appeal from the County Court at Ballarat.

The Defendant was sued for £59 10s., for a call (the 20th) of 5s. per share, on 238 shares. The company was registered under the Act No. 228, and its deed of association provided that meetings should be held in February and August of each year for the appointment of directors; if a quorum of shareholders was not present the meeting might be adjourned for a week; if no new directors were appointed at these meetings the former directors were to continue to act till new directors were appointed at the first meeting of the following year. The directors who made the call sued on, were appointed in February, 1866; in August, 1866, a meeting of the company was called for the appointment of directors, but there was not a quorum present. The meeting was adjourned for a week, but again there was no quorum, and the meeting lapsed. No meeting was held after that date. The call now sued on was made in August, 1868, for the purpose of paying off liabilities. The Defendant contended that there were no directors after February, 1867, as directors could not continue in office for more than a year, and therefore the call was illegally made. For the Plaintiff it was argued that, by the rules, the old directors were to act till new ones were appointed, and therefore that the directors nominated in February, 1866, remained in office in August, 1868. The Judge nonsuited the Plaintiff, who appealed.

The deed of association of a mining company, registered under the Act No. 228, provided that meetings should be held in February and August of each year for the appointment of directors, and if no new directors were appointed at those meetings, the former directors were to continue to act, till new directors were appointed at the first meeting of the following year. Directors were appointed in February, 1866. In August, 1866, a meeting was called for the election of directors, but lapsed for want of a quorum. No meeting of the company

was held after that date.

Held, that under any circumstances, whether a meeting was held or not, the directors could not remain in office more than a year, and that a call made by them in August, 1868, was invalid.

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Higinbotham for the Appellant*Fellows* for the Respondent.*Howbeach Coal Company v. Teague (w)* was referred to.*Cur. adv. vult.*

October 4.

STAWELL, C. J.—The plaint in this case was to recover calls; and the Plaintiff was nonsuited on the ground that there were no directors who could legally make calls. It is conceded that if the directors were improperly appointed, or if there were no directors, no calls could be enforced. The sole question is whether there were in this instance any directors properly appointed. The Act No. 228, prescribes the nature of the rules to be framed by companies incorporated under the Act, and amongst others, one for the election, removal, and annual retirement of all or some of the directors. In this case the company provided, by their rules, that if at any meeting for the election of directors a quorum was not present, the meeting might be adjourned for a week, and if at that meeting there was not a quorum, the former directors might continue in office till new directors were appointed at the ordinary meeting in the following year. The rules also provided that an ordinary meeting should be held every six months, and directors should be appointed every six months. In a case, some two terms ago, in which this company were concerned, an objection was made that the rule that directors were to be appointed every six months was not within the Act; but we then held that twelve months was the maximum period allowed by the Act, and that an election might be held as often within that period as the company thought fit. The Plaintiffs urge that the directors can hold office till

(w) 5 H. & N., 151.

their successors are appointed, although that time may exceed a year; for if a meeting cannot be held, and the directors must retire, the company would be in a state of collapse. But that is the company's own fault. They are to blame if there are no directors. The Defendant contends that, under any circumstance, whether a meeting is held or not, the directors cannot remain in office more than a year. We think the view urged by the Defendant is right, and we dismiss the appeal.

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Appeal dismissed, with costs.

IN RE WOODS AND THE TRANSFER OF LAND STATUTE.

SUMMONS calling on the Registrar of Titles to substantiate and uphold the grounds of his direction not to register, under the "*Transfer of Land Statute*," the land the subject of the application.

September 14.
October 4.

The objection taken by the Registrar to registering the land is stated in the following case:—

"1. On the 18th April, 1860, *Daniel Owen* was the mortgagee in fee of Crown Allotment 10 of sec. 7, town of Warrnambool. 2. On the 3rd September, 1862, a re-conveyance of such allotment was purported to be executed by him by his attorney *John Daviss*, constituted by a power of attorney not given for valuable consideration, dated the 28th of May, 1860, and filed on the 1st September, 1862. 3. Application has been made to bring the allotment under the operation of the '*Transfer of Land Statute*,' and evidence has been required that *Daniel Owen* was alive on the 1st of September, 1862, but compliance with such requisition is refused. 4. Direction has been given not to register the land, and in compliance with a requisition in this behalf, and pursuant to 135th sec. of the said statute, the following is stated as the ground upon which such requisition was given:—That evidence is requisite to show that *Daniel Owen's* power of attorney continued and was in force on the day whereon it was filed. Above is the ground upon which the direction mentioned in paragraph 4 was given.

A conveyance of real estate purported to be executed under a power of attorney previously registered.

Held, that in order to shew a good title, evidence must be given that the principal was alive at the date of the registration of the power.

"THOS. SUNDERLAND.

"Assistant-Registrar of Titles."

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J. W. Stephen for the Applicant.

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WOODS
&

Holroyd for the Registrar.

THE
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Cur. adv. vult.

October 4.

STAWELL, C. J.—The point in this case could not be put more summarily for the applicant, than it was on the argument. It is simply whether it is competent to file a power of attorney given by a dead man. In whatever way the case is viewed there is difficulty, and that difficulty arises from the 95th and following sections of the "*Instruments and Securities Statute*." That section enacts that "every power of attorney heretofore made, or hereafter to be made, shall continue in force until the death, bankruptcy, or insolvency of the principal, or the revocation of such power shall have been registered as hereinafter mentioned." The Applicant relies on these words, and urges that whatever the Legislature may have meant, their intention is to be deduced solely from the words used, and that they have declared every power shall continue in force till the death or bankruptcy of the maker has been registered, and the words, if taken by themselves, certainly convey that meaning. But the whole of the Act must be considered if there is any dispute as to the meaning of any particular part of it. A subsequent portion of the same section declares that "Every act within the scope of the powers and authority conferred upon him which shall hereafter be done performed or submitted to by the attorney after such death bankruptcy insolvency or revocation as aforesaid and before registration thereof as hereinafter mentioned shall in favor of any person who shall *bonâ fide* and without notice of such death insolvency bankruptcy or revocation have dealt with such attorney in the name of his principal be as effectual in all respects as if such death bankruptcy insolvency or revocation had not happened or been made." In other words, the first

portion of the section, in general terms, declares that every power shall continue in force till the death of the maker has been registered, while the subsequent part of the section declares that every act done after the death and before its registration shall be valid in favor of a certain limited class—namely, those who have *bond fide* and without notice of the death dealt with the attorney. Subsequent parts of the Act point to a desire on the part of the Legislature that every power of attorney shall be filed or registered. Section 98 renders it imperative in certain cases to file the power before any deed under it can be executed, otherwise the deed is void. Section 99 enacts that the fact of the death, bankruptcy, or insolvency of the principal, or the revocation of the power, shall be filed in the same manner as powers of attorney are directed to be filed, and shall be annexed to the power to which it relates. According to that section, the power must be filed before the revocation is filed; for the revocation cannot be annexed to a power in the Registrar's office if the power has not been already filed there. If this were not so, notice would be given to the world that a power of attorney had been revoked when the public did not know that any such power had been given. The "*Transfer of Land Statute*," sec. 118, certainly contemplates that a revocation may be filed at any time within four months before the power is filed. How that difficulty is to be got over it is unnecessary now to decide; but apparently the Act subsequently passed does assume that it is possible to file a revocation before the power itself has been filed. According to the section we are now considering, however, we are of opinion that, in order to enable the revocation of a power to be annexed to a power, the power itself must be filed. We think the sound construction is, that the first portion of sec. 95 is to be read as explained by the subsequent portion. In that way all parts of the same section are consistent with each other, and the section itself is consistent with the subsequent sections of the Act. We think we should be doing

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violence to the words of the whole section, if we adopted the construction contended for by the Applicant. We therefore think the Registrar was right in the view that he took, and that the summons must be dismissed.

Summons dismissed.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,

AT LAW.

IN

HILARY TERM, 33 VICTORIÆ (a).

The Judges who sat in Banc in this Term were—

STAWELL, C. J.

WILLIAMS, J.

BARRY, J.

REGINA v. LONGMUIR.

1869.

November 25.

SPECIAL case reserved by *Barry, J.* The information charged the prisoner with having feloniously caused grievously bodily harm to one *Laughton*. The jury brought in a verdict of guilty of a common assault. The question for the opinion of the full court was whether the verdict under the above circumstances should stand.

Where an information charges a prisoner with having feloniously caused grievous bodily harm, and he is found guilty of a common assault, in the absence of any enactment giving a jury liberty so to find, the

Wrisson for the prisoner.

Dunne for the Crown.

verdict cannot stand. Section 369 of the "*Criminal Law and Practice Statute*," No. 233, gives no such liberty.

(a) The cases in this Term are reported by *Hartley Williams, Esq.*, Barrister-at-law.

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The authorities cited for the prisoner were *Reg. v. Jones (f)*, *Reg. v. Cleeves and another (g)*, *Reg. v. Cross (h)*, *Reg. v. Oliver (j)*, *Reg. v. Yeadon (k)*, "*Criminal Law and Practice Statute*," No. 233, sec. 369, 1 *Vic.*, c. 85, sec. 11. For the Crown: *Reg. v. Taylor (l)*, *Hales, P. C.*, 246.

STAWELL, C. J.—In the absence of an enactment empowering such a course, it would be wrong to include both a misdemeanour and a felony in one information. The offences are of two different natures. If the verdict of the jury were to be allowed to stand in this case, it would virtually amount to the insertion in the information of a count which ought not to be inserted; and the prisoner, if he did not demur, would find it difficult to take the objection afterwards. He should be allowed an opportunity of raising the objection, and of this opportunity he would be deprived if the verdict were to stand. There is also a strong argument against the verdict being sustained which is deducible from the course of English Legislation. The 1st *Vic.*, cap. lxxxv., sec. 11, was passed to enable indictments in these cases to include assaults, but it gave rise to so much difficulty that it was repealed. The repeal shows what the law must be. A similar argument may be drawn from the language of sec. 369 of Act No. 233. The prisoner ought to be acquitted.

Conviction quashed.

(f) 3 Cox, 441.
(g) *Ib.*, 429.
(h) 1 *Ld. Raym.*, 711.

(j) Bell, C. C., 237.
(k) L. & C., 81.
(l) L. R., 1 C. C. R., 194.

REGINA v BROWN.

1869.

November 25.

SPECIAL case reserved by *Williams, J.* The 4th count of the information charged the prisoner with destroying a letter sent by post, the property of the Postmaster-General, on which count he was found guilty. The question for the opinion of the Court was whether the evidence of one *Sarah Roberts* was properly admitted or not, she not having been examined as a witness before the committing magistrate, and the prosecutor having given no notice to the prisoner of her name, or of what it was expected she would prove. The case referred the Court to *Reg. v. Pietro Stigenani (m)*, which had been relied on by counsel for the prisoner.

It is a rule of practice, to be observed in all courts to which prisoners are committed, not to permit the examination of witnesses the knowledge of whose evidence has been withheld from the prisoner till the trial.

Seemle, that such examination may be allowed where a very strong excuse, to the satisfaction of the presiding judge, is put forward by the prosecution.

The propriety of the admission of such evidence is not a question of law within the Act No. 233, sec. 389.

Dunne for the Crown.

No appearance for the prisoner.

STAWELL, C. J.—I do not think this is a question of law arising at the trial. It may, no doubt, be a very salutary rule to observe; and it ought, so far as practicable, to be observed in all courts to which prisoners are committed. It should require a very strong excuse indeed to permit the examination of a witness, the knowledge of whose evidence has been withheld from the prisoner till the trial.

WILLIAMS, J.—It seems to me to be merely a rule of practice, and not a question of law, not to permit the examination of witnesses not previously examined.

Conviction affirmed.

(m) 10 Cox., 522

1869,

Nov. 24, 27.

A Warden can not dismiss a summons with costs where the parties taking out the summons do not proceed with the case.

A Judge in Chambers may make an order absolute in the first instance for a *certiorari*.

There is no sound distinction between the case of Justices and Wardens as to giving notice of application for a *certiorari*.

REGINA v. CARR.

RULE nisi on return to a writ of *certiorari*, to quash an order made by the Warden, dismissing the summons with costs.

Sixty-three persons were summoned before the Warden, in a proceeding by which the Plaintiffs sought to be put in possession of some ground at Maryborough. The summons was returnable on 12th April, but only eight Defendants being served. On 8th April Plaintiffs obtained an order to substitute service on the others. It was afterwards held by the Chief Judge of the Court of Mines that such an order could not be made before the case came on for hearing. The case again came before the Warden, and was several times adjourned, owing to the illness of Plaintiffs' attorney. On 19th July, the Warden refused to again adjourn the case; but dismissed the summons, with £34 10s. costs.

Higinbotham, Quinlan and Casey shewed cause.

Mackay and Fellows for the rule.

A preliminary objection was taken that the writ of *certiorari* had been granted in vacation, and did not purport to be made under the emergency clause. Further, no notice had been given to the Warden. *Reg. v McIntyre* (n), *Knowles v. Lynch* (o), *Brewer and Wilstone ex parte Baker* (p). Against this it was urged that it was unnecessary to give any notice to justices; that there was no distinction between justices and Wardens; and that the writ of *certiorari* had been properly granted. *Reg. v. Newton Ferrers* (q).

(n) *Ante*, Vol. IV., L., 42.

(o) 2 Dowl., P.C., 623.

(p) 2 W. & W., L., 136.

(q) 9 Q.B., 32.

The Court overruled the objection, holding that there was no sound distinction between the case of justices and Wardens, and that the Judge in Chambers could grant an order absolute in the first instance for a *certiorari*.

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The rule was then argued. The authorities cited were:—Sections 177, 179, 180, 193, 212, 230, 233 of the "*Mining Statute*," *Orepps v. Durden and Others* (r), *Re William Baker* (s), *Reg. v. Justices of Cambridge* (t), *Reg. v. Manchester and Leeds Railway Company* (v), *Sim v. Eddy* (w), *Bradshaw v. Vaughton* (x), section 110 of the "*Justices Statute*." The principal argument urged in support of the rule was that the Warden had no power to dismiss the case, but could only strike it out, and could not give costs.

Our. adv. vult.

PER CURIAM.—The order made by the Warden practically amounts to a dismissing of the suit for want of prosecution. But no provision for such a case is made by the Act. Whether the omission is intentional or not is not now to be considered. So far as the Plaintiffs are concerned, they could not, if this order were allowed to stand, proceed further in this case, and they would have great difficulty in instituting any other suit. The rule must, therefore, be made absolute on that ground, and that only. No costs will be given either of the rule or of any previous proceedings.

November 27.

Rule absolute; no costs.

(r) 1 Sm., L.C., 649.
(s) 2 H. & N., 219.
(t) 3 B. & Ad., 897.

(v) 1 P. & D., 164.
(w) *Ante*, Vol. III., L., 21.
(x) 30 L.J., C.P., 93.

1869.

Nov. 24, 27.

TAYLOR v. PHELAN.

The board-room of a District Road Board, though the proceedings of the Board are required by Act of Parliament to be conducted with open doors, and the public have a right of admission thereto, is not, during the sitting of the Board, a public place within the meaning of the 26th sec. of the "*Police Offences Statute*."

Swan v. McLellan (2 W., W. & A.B., L., 6) in so far as it may be inconsistent with this case over-ruled.

November 27.

SPECIAL case by way of appeal from Petty Sessions

The Appellant had been convicted by the magistrate of using insulting and abusive words in a public place, to wit the board-room of the Keilor Road Board, towards the Respondent, and was fined by the magistrates £10, with costs. The meeting in the board-room was held with open doors, and strangers were present when the abusive language was used. The question for the opinion of the Court was whether the board-room of the Keilor Road Board was, under the circumstances, a public place within the meaning of the 28 *Vic.*, No. 265, sec. 26.

Billing, for the Appellant, cited *Re Matheson* (y).

Fellows for the Respondent. The public have a right to be present at these board meetings, and the room is clearly a public place. *Swan v. McLellan* (z), *ex parte Freestote* (a), *Reg. v. Thalman* (b).

Our. adv. vult.

STAWELL, C. J.—This is a case stated by Justices by way of appeal, and the question put is whether the board-room of a district road board is a public place within the meaning of the "*Police Offences Statute*." It appears that the "*Local Government Act*" requires the proceedings of these boards to be conducted with open doors, and the public to be admitted, unless it is necessary to remove them for disorderly conduct. The "*Police Offences Statute*" uses the expression "public place" in one section and in another

(y) Sup. Ct. Vic., July 5, 1865.

(z) *Ante*, Vol. II., L., 6.

(a) 25 L. J. M. C., 121.

(b) 9 Cox, 388.

the words "place of public resort," evidently drawing a distinction between the two; for if the fact of the public resorting to a place occasionally or constantly rendered it a "public place," there would have been no necessity to depart from the expression public place, and make use of the words "place of public resort." The mere fact that a place is a place of public resort during certain periods does not render it a public place during those periods. If the distinction so wisely drawn by the Legislature is not observed, great difficulties must follow. In one case it was held that being in an omnibus was being in a public place; but that appears to have been founded on this, that the omnibus itself was in a street. An omnibus elsewhere than in a street would not be a public place. For in another case, where persons were convicted of playing at cards in a certain public place—viz, a railway carriage—it was held that the information was bad, for it was consistent with the case that the carriage had been shunted into a shed, where it would not be a public place. In *Swan v. McLellan* we expressed an opinion that a room in a public-house might be so far dedicated to the public that it might be a public place. Without expressing any opinion whether that decision is in conflict with the present, so far as it may conflict we desire to adhere to our present ruling. Under the circumstances we do not think this a case for costs.

1869.
TAYLOR
v.
PHELAN.

Appeal allowed, without costs.

1869.

December 2.

A Warden has no jurisdiction, before the hearing of a summons, to make an order for substituted service.
Taylor v. Stubbs approved and followed.

REGINA v. AKEHURST.

RULE *nisi* on a return to a writ of *certiorari* to quash an order of the Warden at Alexandra.

A summons was taken out in a proceeding before the Warden relating to a mining claim. Before the case came on for hearing, the Warden made an order substituting service by advertisement in a local newspaper, and when the case was heard, made an order against Defendant. The Defendant, alleging that he had never heard of the proceedings, applied for the present order.

Billing shewed cause.

Mackay moved the rule absolute, and cited *Taylor v. Stubbs* (c).

PER CURIAM.—The Warden had no jurisdiction to make the order.

Rule absolute, with costs.

(c) *Infra* Mining, 19.

HAZLEHURST v. KERR.

December 10.

A police court is not a court of competent jurisdiction within the meaning of the Act No. 229, sec. 15.

APPEAL from Petty Sessions, Graytown.

Fellows for Appellant.

No appearance for Respondent.

The Appellant had been summoned for permitting his dogs to worry twenty-five sheep, the property of the Respondent, and was fined £12 10s. The "*Dog Act 1864*," No. 229, sec. 15, allows damages for the injury to sheep by dogs to be recovered in a court of competent jurisdiction. The question for the opinion of the Court was whether a police court was such a court.

1869.
HAZLEHURST
v.
KEER.

PER CURIAM.—The justices had no jurisdiction.

Appeal allowed, with costs.

REGINA v. CARR.

RULE nisi to prohibit the justices at Maryborough enforcing a warrant of ejectionment.

Quinlan for the rule.

Higinbotham and *Casey* shewed cause.

Before the order was served, but after it had issued, the warrant had been enforced. On a preliminary objection taken that as the warrant had been enforced there was nothing to prohibit, the Court held that the issuing of the order operated as a stay of all proceedings. On a second objection being taken that the "*Justices of the Peace Statute*" only allowed prohibitions to be issued in cases of "conviction" or "order," and that this warrant was neither a conviction nor an order, *Mayor of Fitzroy v. Collingwood Gas Company* (d), it was held by the Court that this objection was fatal, and that the rule must be discharged.

December 10.

An order to prohibit stays all proceedings from the time of the issuing of the order, not from the time of its service.

The "*Justices of the Peace Statute*" only allows prohibition to issue in cases of "conviction" or "order." A warrant of ejectionment is neither a conviction nor an order.

Rule discharged.

(d) *Ante*, 72.

1869.

November 25.
December 15.

REGINA v. DAVIES.

SPECIAL case reserved by *Williams, J.*, as follows:—

Gold may be considered as taken from a vein or bed within section 104 of the "*Criminal Law and Practice Statute*," though the gold be in grains separated by particles of earth, provided it be in its natural position *in situ*.

To constitute a place where mining operations are carried on a mine, there must be a shaft, or something analogous to a shaft, but the distance of the shaft from the spot where the operations are being actually carried on makes no difference.

Miners' rights confer no authority on the holders to enter on and

take gold from lands alienated from the Crown without the consent of the proprietor.

Where a verdict of "guilty" has been returned on an information for stealing on two classes of counts, the property being laid in different persons, the verdict need not be restricted to one or other of those classes; substantially only one class of offence is charged. The offence is the offence of stealing, and none of the charges contained in those counts can form the subject of any future information.

"The prisoner was tried and convicted before me, at the Criminal Sessions held at Melbourne on the 18th and 19th days of October last, on an information containing twenty-two counts, charging him with larceny of gold, the property of the Bonshaw Freehold Mining Company, Registered. During the trial various questions of law arose, and as these questions are mainly determinable on my notes and the documentary evidence adduced at the trial, I append my notes and the documents to this case, and desire that they may be incorporated in and read as a part thereof. It was contended on the part of the prisoner that there was no case to go to the jury. That there was no mine—no taking—no felonious intent, proved in evidence. That the gold alleged to be stolen was in the form of separate grains of gold contained in wash-dirt, and that in the portion of the land in which the said wash-dirt was taken—that is to say between the boundary of the Bonshaw Freehold land and the road reserved by the Crown grant—there was no shaft open on the surface and no drives underneath in connection with the *locus in quo*, and therefore the gold had not been taken from any mine, lead, or vein within the meaning of the '*Criminal Law and Practice Statute*,' sec. 104; that it appears from the evidence that the gold was not the property nor in the possession of the Bonshaw Company; that it appears from the evidence that the possession of the gold was in the Prince of Wales Company, and the prisoner, as mining manager of the said company, took the said gold as he lawfully might; that the prisoner took the said gold with the implied or tacit consent of the Queen; that it appears in evidence that both the Queen and the Bonshaw Company waived their claim, if any, to the gold; that there is no evidence to go to the jury of felonious intent. The prisoner was admitted to bail on condition that he should appear before the Court in Banco on the first Thursday in Term, being the 25th day of November, 1869, to hear the decision of the full Court upon the case, which decision I have the honor to request."

Michie, Q.C. (with him *Ireland*, Q.C., *Hearn* and *Trench*), for the prisoner. In the first place, the gold could not be considered as the property of the Bonshaw Company. If the gold belonged to any one other than the Crown it belonged to the Prince of Wales Company, by virtue of their miners' rights, or at any rate the land from which the gold was alleged to have been stolen was disputed land, the title to which as between the Bonshaw Company and the Prince of Wales Company had not been settled. Therefore the Judge ought to have told the jury to leave out of consideration altogether all the counts which stated that the gold was the property of the Bonshaw Company. In the second place, the conviction is bad, because this was not a "mine" of the Bonshaw Company. The gold was taken from land on the opposite side of the road to that on which the Bonshaw Company had sunk their shaft; and the land which really belonged to the Bonshaw Company and this disputed land were two distinct parcels of land, divided by a road; on one of these the Bonshaw shaft was sunk; from the other the gold was removed by the Prince of Wales Company, by superintendence of the prisoner. To constitute a mine there must be an opening from the surface. Further, as holders of miners' rights, and as such having sunk a shaft on Crown land, the Prince of Wales Company were at perfect liberty to reach and take gold on private land, if they could do so without committing a trespass. The private owners had no right to the gold, for the freehold of the soil gave no property in the gold. *Com. Dig.*, 636, *Millar v. Wildish* (e). 3rdly. There must have been a taking, actual or constructive, out of the possession of some one. But here the estate in the gold is vested in the Crown, and that in the land in the Bonshaw Company. The Crown has given a license to the Prince of Wales Company to seek for gold, and in the grant to the Bonshaw has reserved the gold to itself. Both companies may therefore be looked upon as licensees, and whichever got

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the gold first might keep it. The Prince of Wales got it first, so it was in their possession, and never in that of the Bonshaw Company. Again, it was clearly proved at the trial that the prisoner had no interest in the company, that he was simply the hired servant of the company, and working under the orders of those appointed to superintend him. In *Ress v. Van Muyen* (f) it was held that the master of a Prussian ship, captured by an English cruiser, ought not to be convicted of larceny if he removed goods from the ship, not for his own benefit, but for that of his owners. In this case the prisoner did not take the gold for his own benefit, but for that of his masters—the company.

Fellows (with him *Mackay, Adamson* and *G. P. Smith*) for the Crown. To constitute a mine there need be no shaft. Any opening will do—a drive or a tunnel. The case of *Rex v. The Inhabitants of Foleshill* (g) shews that any entrance anywhere is sufficient to constitute a mine. But even if this be not a mine, the words of the Act include gold either in bed or vein, and the evidence here shews that the gold if not taken from a mine was taken from a vein. Again, as to ownership, it matters not whose gold it was. The two sets of counts are only two modes of stating the same offence. The prisoner could certainly be sentenced on all the counts separately, but it would be all only one sentence. Again, as to the question of felonious intent, the way in which the working was carried on with respect to the gold in question afforded ample evidence that a fraud was intended; and besides this these workings were kept out of the plan supplied to the Directors of the Prince of Wales Company. Then as to the claim of right, it is clear the miners' rights only authorise mining on Crown lands. They give no rights on purchased land. As to the road dividing the property and making two parcels of it, it has been decided that the soil to the centre of the road

(f) R. & Ry., 118.

(g) 2 A. & E., 593.

belongs to the owners of the adjacent property *Davis v. The Queen* (*h*), and as the land on either side belonged to the Bonshaw Company, the existence of the road makes no difference.

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Michie in reply.

Our. adv. vult.

WILLIAMS, J., read the judgment of the Court as follows:— December 15.

The prisoner was tried and found guilty on twenty-two counts for stealing gold. The number of counts was caused by the desire of the Crown to lay the property in different possessions, and to vary the description of the place from whence the gold was stolen. At the trial various objections were raised by counsel on behalf of the prisoner, which the learned Judge reserved in the form of a special case for the opinion of the full Court, and deferred passing sentence until such opinion was known. The case accordingly came under the consideration of the Judges during the last Term, and was fully argued and considered. It is proposed now to give the result of their deliberations. It was propounded on the part of the prisoner—1st. That the gold was taken from no vein, bed, or mine (See sec. 104 the "*Criminal Law and Practice Statute 1864*"), and that it was in the form of separate grains contained in auriferous earth (wash-dirt). We consider this objection is answered by the fact that the gold was in its natural position (*in situ*), that is in a bed or vein. The separation by particles of earth does not render it less a bed or vein, though it may render it less rich. Gold when found is always separated by something—earth, or quartz, or rock. It is only a question of degree. 2nd. The next objection was—That in the portion of land from which the auriferous earth was taken, that is between the Bonshaw Freehold

(*h*) *Ante*, Eq., 106.

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land and the road reserved by the Crown, no shaft was opened on the surface. The answer is twofold—The reservation of the road was not a reservation of the soil underneath, but merely of the right of passing over it. And again, the authority cited *Rex. v. The Inhabitants of Foleshill*, showing that mining operations may be conducted under several parishes, accessible by one shaft only, also disposes of the objection. 3rd. It was next urged that the prisoner took the gold with the tacit or implied assent of the Queen. The argument was founded on the supposition that a miner's right enables the holder to follow a vein of gold off Crown lands on to lands alienated from the Crown. But as the provisions of the 29 *Vic.*, No. 291, refer either to Crown lands or lands leased from the Crown for mining purposes, miners' rights confer no authority to enter on and take, without the consent of the proprietor, gold from lands which have been alienated from the Crown. Payment is made for miners' rights to work Crown lands, and Crown lands only. This view also meets the objection of waiver, for the only evidence in support of waiver was the issue of a miner's right to the Prince of Wales Company, but such a document does not relate to lands alienated from the Crown. 4th. It was then urged that the gold was not the property, nor in the possession of, either the Queen or the Bonshaw Company. But certainly it was either in the one or the other. The gold forms part of the mine and the mine belongs either to the Crown or to the Bonshaw Company. It does not belong to any third person. 5th. Counsel for the prisoner next submitted that there was no felonious taking proved; that the claim of right disproved any felonious intention; that the prisoner was the hired servant of the company; that he had no share or interest in the gold; that to constitute larceny there must be a clear intention to deprive another of his property. Now, referring to the evidence, let us examine it and see what was proved. There are the clandestine manner in which the secret

drive was worked, and that under the direct and immediate supervision of the prisoner; the obvious intent with which this drive was formed, and conducted in a direction different from the main drive, through which the general operations of the mine were carried on; the artifice with which the approach to this drive was concealed, and the entrance masked so as to make it resemble the adjacent panelling of the main drive; the designing spirit with which this drive was made, many months before the taking, in anticipation of the probable exhaustion of the gold in other quarters; and, lastly, the omission of any tracing of the secret drive from the plan of the mine laid before the shareholders, of which the prisoner, as manager, was cognisant. Each of these individually—and all certainly collectively—affords evidence to go to the jury on the question of criminal intention. As before stated at the trial, a general verdict of “guilty” was returned on the twenty-two counts. For one class of counts the property was laid in the Crown, and the other in the Bonshaw Company; and it is now objected the verdict should be restricted to one or other of these classes; that as substantially the prisoner was charged with having committed only one class of offence, it is inconsistent he should be found guilty of having committed two. The record itself is correct—all the counts are good. The punishment is fixed by law. This is not a bad finding on a good count within the meaning of the decision in *O’Connell’s* case. It is at most two good findings on two good counts, which it is said the evidence shews are inconsistent with each other; but this alleged inconsistency is more in form than in substance. The offence is one, and one only—“stealing;” and for that offence, though formally judgment must be pronounced on each count, substantially only one punishment is inflicted; and it may be further observed no one of the charges contained in these counts can properly form the subject of any future information. The present verdict may be pleaded in bar to any such

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prosecution. On all points the Court is of opinion the verdict should not be disturbed, and that the prisoner should be called up for judgment.

Conviction affirmed.

Dec. 1, 2, 16.

LANGAN v. CLARKE.

In an action for malicious prosecution and false imprisonment, the jury were directed not to take into their consideration with reference to the false imprisonment a conversation between the Plaintiff and Defendant after the arrest and before the Defendant signed the charge sheet.

Held, that as regarded the malicious prosecution the evidence of the conversation was properly left to the jury; and that as regarded the false imprisonment, it was properly withdrawn from them.

Held further, that the evidence of the conversation was open to the jury on the question of damages.

RULE *nisi* for a new trial on the ground of misdirection.

This was an action to recover damages on the first count for malicious prosecution, and on the second count for false imprisonment. Pleas, not guilty to the declaration, and justification to the second count.

It appeared from the case that on the 20th July, 1869, Plaintiff, who was a servant of the Defendant, was sent up-stairs to get a handkerchief, but she remained a longer time up-stairs than was necessary for that purpose. The Defendant and his wife then went out, and on their return Defendant's wife missed her brooch. Defendant consulted with some friends and then sent for a detective, and after some enquiries gave Plaintiff into custody. On the road to the watch-house Defendant had a conversation with the Plaintiff, when she said "If you look in the wardrobe you will find the brooch." The jury found for the Defendant on the first count, and for the Plaintiff on the second, with damages; but *Williams, J.*, at the trial had told the jury that in considering the second count they were not to consider the conversation on the road to the lock-up. This was now complained of as a misdirection.

Fellows and *Casey* shewed cause.—The statement made by the Plaintiff was properly withdrawn from the jury, in fact was inadmissible, she having made it after she was

given into custody. If the statement amounted to an admission that she, the Plaintiff, was the thief, even then it was inadmissible on the issue raised, because the Defendant did not by his plea allege that the Plaintiff was the thief. To justify a false imprisonment the Defendant must shew first, that a felony has been committed; and then, that at the time of the arrest he was aware of such facts as induced a reasonable supposition that Plaintiff was the thief.

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Dobson for the rule.—The evidence withdrawn was material to shew that a felony had been committed. It corroborated what had occurred in the house. It could hardly be contended that because one witness swore to one fact, another could not be called to corroborate him; so the facts in this case which proved that a felony had been committed could be corroborated by the evidence rejected.

Our. adv. vult.

STAWELL, C. J.—This is an action for a malicious prosecution, and for an unlawful imprisonment. A verdict was returned for Defendant on the first count, and for Plaintiff on the second, with damages. The present rule was obtained on the ground of misdirection, the judge having directed the jury to exclude from their consideration of the second count a conversation that occurred after the arrest took place. The jury were at liberty to consider that evidence as regarded the first count—the malicious prosecution—for the prosecution was not instituted until the Defendant signed the charge sheet after he had gone through the gardens, and after the conversation. On that, the jury were directed that if they believed the evidence, the Defendant was justified in doing what he did, for he had then reasonable and justifiable cause for instituting the prosecution. That direction has not been excepted to.

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We think it was right, and we concur in the verdict. The second count is, however, a very different matter. In it the Defendant is sued for false imprisonment, and the imprisonment commenced at the Defendant's house. Excising the conversation from the evidence, it is very questionable if there is any evidence at all of a felony having been committed. The brooch was missed, but it was afterwards found in the same drawer as that in which the Defendant's wife had put it, in a different part of the drawer no doubt, but in a drawer of which the Defendant's wife kept the key. It was suggested that this might have arisen from a mistake of the Defendant's wife, that the brooch might have been placed by accident, or inadvertently, by her, where it was found, and that it escaped her recollection. All that theory was, however, answered by the conversation in the gardens, which afforded evidence not only that a felony had been committed, but that the Plaintiff was the felon, for she made observations which were not consistent with her innocence, and seems to have been aware where the brooch would be found, before it was found. We think the conversation was properly withdrawn from the jury on this count, for the imprisonment must be justified on grounds within the Defendant's knowledge when the Plaintiff was falsely imprisoned, and that imprisonment commenced at the moment she was given into the custody of the detective. The direction of the judge was perfectly right, and if we had fully understood all the facts of the case the rule *nisi* would not have been granted. The evidence was not withdrawn from the jury altogether. It was open to their consideration on the question of damages, and there is no doubt that if they believed it, she was entitled to very small damages.

It is said that the verdict is inconsistent, that if the Defendant succeeded on the first count he ought to succeed on the second, and if the Plaintiff succeeded on the second she ought to succeed on the first. We cannot concur in

that proposition. The question on the first count was whether the Defendant had reasonable and probable cause for instituting the prosecution, and we think he had. On the second count the question is whether a felony had been committed, or whether it was a mistake. It was fairly open to the jury to say which view they would take, and we see no inconsistency in their finding. The damages seem large, but that was a question wholly for the jury. It should be remembered that there was an apparent precipitancy in giving the Plaintiff into custody. There was no reason why she should not have been allowed to remain in the house till the following morning, and the usual course taken of obtaining a summons or a warrant from the magistrates. These circumstances did not escape the attention of the jury. There was also evinced a desire rather to recover the property than to prosecute the thief to conviction. The verdict was right, and we ought not to disturb it.

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Rule discharged.

JENKINS v. SPEED.

APPEAL from Petty Sessions.

The Respondent (the Defendant below) had been sued by the official agent of a mining company, registered under "The Mining Companies' Limited Liability Act 1864" (No. 228), for calls on certain shares which had been forfeited under the 25th rule of the company's deed of settlement, which rule provided for forfeiture of shares for nonpayment of calls. Some time after the forfeiture the company was wound up, and the Appellant (the Complainant in the court below) appointed official agent. The magistrates having held that the forfeiture released Defendant from his liability, dismissed the summons.

Dec. 2, 16.

A company registered under the Act No. 228, has no power under that Act, to make rules for the forfeiture of shares; and this, whether the rules are made and assented to, before, or after, registration.

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McFarland for the Appellant. The company had no power to forfeit shares; Defendant's liability for calls therefore still existed. *McKean v. Cleft in the Rock Company* (j), and *Creswick Grand Trunk Company v. Hassall* (k), shew that companies registered under the Act No. 228 must be strictly limited to the powers and privileges conferred on them under that Act. That Act does not enable them to forfeit shares; and in *Nolan v. The Annabella Company* (l) it was held that a company under the Act had no power to forfeit shares.

Molesworth for the Respondent. In *Nolan v. The Annabella Company* the rules were made after registration, here, before. Thus, in the present case, all the shareholders bound themselves by certain conditions, one of which was that the company had power to forfeit shares. Again, the forfeiture clauses in the company's deed are not inconsistent with the Act No. 228. They merely provide a means of enforcing payment of calls: *Stuart v. Anglo-Californian Gold Mining Company* (m). Further, the shareholders having signed the deed of settlement are estopped now from saying there was no forfeiture: *Re Knight* (n), *Lindley on Partnership*, 137.

Cur. adv. vult.

December 16.

STAWELL, C. J.—The question for us is, whether a company registered under the Act No. 228 has power to make rules for the forfeiture of shares. This point has already been decided by the Chief Judge of the Court of Mines in *Nolan v. The Annabella Company*, where it was held that forfeiture was not warranted by the Act, and is inconsistent with its provisions; and that a company registered under the Act has no power to pass such rules. It was urged for the Respondent that there is a difference between

(j) Sup. Ct., Vic., 9th April,
1868, *Ante*, Vol. V., Law.
(k) Sup. Ct., Vic., 19th May,
1868, *Ante*, Vol. V., Eq.

(l) *Infra*, Mining, 38.
(m) 18 Q. B., 736.
(n) L. R., 2 Ch., 321.

that case and the present, because here the deed of association was signed before the incorporation, and in that case the deed was subsequent to the incorporation. We think no such distinction can be drawn between the two cases. We expressed an opinion in *Creswick Grand Trunk Company v. Hassall* that there is no distinction between rules passed before, and those after, incorporation. To hold otherwise would be in effect to say that a company had only to pass rules inconsistent with the Act and then be registered, and that those rules would be in force although in direct contravention of the provisions of the Act under which the company is registered, and by which it receives large advantages. The Act confers a great boon on companies, and for that boon they must return some consideration to the public. That consideration ought to be adhered to, and must not be frittered away. The Act prescribes a simple and economical method of recovering calls, and makes provision for the transfer of shares but none for forfeiture. It was well put in the argument that one great reason why the companies should not be allowed to forfeit shares was that they could thereby lessen their liability to the public. Although the shares are generally put up to auction there is no necessity that they should be, and an inducement is offered to shareholders to forfeit some shares to increase the value of the remainder. It is said that in this instance the company is estopped from suing, and no doubt in one aspect this is a hard case. But there is a clear distinction between irregular acts of an authorised class, and acts wholly unauthorised. As to the first there is no doubt that the directors may so act as to bind the company, but it is clear that no directors can bind a company by unauthorised acts, and the act of the directors in this instance in forfeiting the shares was unauthorised. It does seem a harsh case, but when it is considered it resolves into this—that the Defendant had rights of which either he was not aware, or which he did not choose to enforce.

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Appeal allowed. Case remitted to magistrates.

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Dec. 7, 16.

A creditor's deed conveying the personal estate and effects only of the debtor, is not a valid deed within the Act No. 273, sec. 115, even though the debtor swear that as far as he knows he has no real estate.

The word "or," between "conveyance" and "assignment," in that section must be read as "and," an assignment not passing real estate.

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CARO v. DEVINE.

RULE nisi to enter a verdict for Defendant.

Plaintiff had sued on a bill for £62 13s. 8d. given to him by Defendant. Defendant pleaded that he had executed an assignment and conveyance of his property to trustees for the benefit of creditors, and at the trial he proved an assignment of all his personal estate and effects, and that so far as he knew he had no real estate. Plaintiff contended that this deed not assigning all Defendant's estate and effects was void. The jury found for the Plaintiff.

Billing and Lawes shewed cause.

Fellows and Wrixen for the rule.

Our. adv. vult.

STAWELL, C. J.—The plea is a good one—it discloses a good assignment. But it appeared at the trial that the assignment was merely of personal estate, and omitted all reference to real estate. The Defendant was called at the trial and said he had no real estate, and counsel in cross-examination having asked "As far as you know?" he answered "As far as I know." We think this assignment is not a good one under section 115 of the "*Insolvent Act*." That section provides that "in every case where any debtor "resident in Victoria shall execute any conveyance or "assignment by deed to a trustee or trustees of all his "estate and effects whatsoever for the benefit of all his "creditors," the debtor shall be relieved against his debts. In that section the word "or" between "conveyance" and "assignment" must be read "and," for an assignment would not pass the real estate. A debtor who wishes to take

advantage of the Act must convey all his real and personal estate in Victoria or elsewhere, whether he knows of the property or not. He must convey all he has or may have. The trustees are not to be left in the position, that if a large property, as might happen, was devised to the debtor out of the colony, he not being aware of it, they must apply to set the deed aside and make him insolvent in order to obtain the benefit of the devise for the creditors. The plea was therefore not proved, but disproved, and the rule to enter a verdict for the Defendant must be discharged.

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Rule discharged.

THE COUNCILLORS AND RATEPAYERS OF THE
SHIRE OF McIVOR v. NOLAN.

APPEAL from Petty Sessions.

Nolan, the Respondent, had been summoned for rates due to the Shire, and he objected to pay on the ground that the notice of intention to levy the rates had not been published in a newspaper circulated in the district one week immediately preceding the making of the rate, as required by the Act No. 176, sec. 186. It had, in fact, been published in a local newspaper a month prior to the making of the rate. The justices had allowed the objection and discharged the complaint.

Wrixon for the Appellants. The Act is merely directory, requiring the notice to be published, and not mandatory, particularly as it does not go on, as the English Acts do, to say that in default of the publication the rate shall be bad. Therefore here the omission to give these notices did not invalidate the rate.

Dec. 10, 16.

Sec. 186 of Act No. 176 is merely directory, not mandatory, and therefore the omission to advertise notices in accordance with the provisions of the section does not invalidate a rate made.

Seemle, that any person aggrieved by non-compliance with the Act on the part of the councillors may institute proceedings against them for a misdemeanour.

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Fellows for the Respondent. The Act is mandatory, and a failure to comply with its provisions invalidates the rate: *Sibbald v. Broderick* (o).

December 16.

STAWELL, C. J.—The Act No. 176, section 186, enacts that notice of intention to make a rate shall be given by the board by placards posted up in public places, and shall be advertised in some newspaper generally circulating within the district in the week immediately previous to such rate being made. The question in this case is, whether that section is mandatory or merely directory. The road boards are obliged to sit with open doors unless the disorderly conduct of the audience should render it necessary to close them. The ratepayers, however, can take no part in the proceedings of the board; they merely attend to listen, so that beyond the fact that information is given by the publication of the notice referred to, no peculiar advantage is derived therefrom. After the rate has been struck the ratepayer can appeal to the petty or general sessions. To hold, therefore, that all the requirements of the section are mandatory if all the minute particulars are not complied with, would be to turn the administration of justice into contempt; for if the advertisement were published half a day before the time required it would invalidate the rate. The publication must be in the very week, and the placards must be posted in a public place. Now we know that very difficult questions arise on the construction of the term "public place." The case to which we have been referred does not bear the construction contended for by the Respondent. There it was held that a rate was void because the notice was not posted on the church doors. But the Act in that case, after providing for the publication of the notices, went on to say that no rate should be good where these provisions had not been complied with. Those words are omitted from this Act, and if

(o) 11 A. & E., 38.
 11-A-E 38

this section is mandatory, those words are mere surplusage. If, however, the Act is not complied with, the councillors do not escape punishment, for any person aggrieved by non-compliance with the Act may institute proceedings against the councillors for a misdemeanour; and this it is desirable should be generally known.

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*Appeal allowed. Decision of
Justices reversed.*

HARRIS v. THE NATIONAL BANK.

RULE nisi for a nonsuit.

The facts were as follow:—In December, 1863, at a meeting of the creditors of *Lyons & Harris*, auctioneers, it was agreed that the estate should be assigned to Messrs. *Levi and Murray* as trustees for creditors, and it was arranged that *Harris* should be allowed to purchase back the estate by a composition of 8s. in the £. The National Bank, who were creditors, refused to accept this proposal unless *Harris* paid them 15s. in the £. This he agreed to do by bills at twelve months, Mr. *E. Davis* becoming surety for him, *Davis* being in his turn secured by obtaining an absolute conveyance on some land belonging to *Harris*. When the bills became due *Harris* was inclined to resist payment, but was advised that if he did so the Bank could recover against *Davis*, and as *Davis* had possession of his property he might sell it, and thus no advantage would be reaped. He therefore paid the bills, and having obtained a re-conveyance of the property from *Davis* brought this action to obtain the amount of the bills, £1,272.

sel, did not either himself resist payment, or ask *D.* to do so, but paid the bills; and, after obtaining a re-conveyance of the property from *D.*, sought to recover the amount of the bills so paid.

Held, that Plaintiff could not recover back the amount so paid, he having paid voluntarily, without pressure, and with full knowledge of the facts.

Dec. 2, 3, 24.

Plaintiff being about to compound with his creditors at the rate of 8s. in the £, Defendants, being creditors, refused to assent unless they were paid 15s. in the £. Plaintiff, to obtain their assent, agreed to pay them at this rate by bills, one *D.* becoming surety for Plaintiff, and being himself secured by an absolute conveyance of land belonging to Plaintiff.

When the bills became due Plaintiff, under advice of coun-

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Ireland, Q.C., and Higinbotham shewed cause.

Michie, Q.C., and Fellows for the rule.

It was contended in support of the rule that the Plaintiff was not bound to pay the bills, nor was *Davis*; that the payment of them was voluntary, and with full knowledge of the facts, and that therefore the amount could not be recovered. For the Plaintiff it was contended that *Davis* being surety for him and having possession of his property, the Plaintiff was under pressure to pay the bills so as to release his property. The authorities cited during the argument were *Wilson v. Ray* (p), *Gibson v. Bruce* (q), *Horton v. Riley* (r), *Wakefield v. Newbon* (s), *Stokes v. Twitchen* (t), *Smith v. Bromby* (v), *Knight v. Hunt* (w).

Cwr. adv. vult.

December 24.

STAWELL, C. J.—It does not appear that when the Plaintiff gave an absolute conveyance over his property to *Davis* the latter executed any declaration of trust that he held only to secure himself in the event of having to pay the amount of the bills to the bank. As the bills approached maturity Plaintiff appeared to be unwilling to pay them, and consulted counsel, who advised that considering the facts of the case, and that *Davis* held the land absolutely, it would be better to pay the bills and sue the bank afterwards for the amount. He acted on that advice and brought this action. There is no doubt whatever that the bank obtained a larger dividend than the other creditors, and if instead of bills having been given the amount had been paid in money to the bank, Plaintiff would be entitled

(p) 10 A. & E., 82.
 (q) 5 M. & G., 399.
 (r) 11 M. & W., 492.
 (s) 6 Q. B., 276.

(t) 8 Taunt., 492.
 (v) Doug., 696.
 (w) 5 Bing., 432.

to a verdict, for although each would be *in delicto*, the *delictum* would not be *par*. The Plaintiff would have committed a less serious offence than the Defendants, and it would be contrary to justice and good conscience to have allowed the Defendants to retain the money from the Plaintiff, although he could not be exonerated from censure. As the Plaintiff, however, paid by bills, the onus was cast on him of defending an action on those bills; and according to the authorities he could have successfully resisted payment. The bank themselves suggested that *Davis* should be protected by security given by the Plaintiff. This rendered the Plaintiff wholly dependent on the act of the surety, and had the surety been asked to resist the payment, declined to accede to that request, and insisted on the bills being met, we think his refusal would have been substantially the refusal of the bank. The Plaintiff by the act of the bank was rendered wholly dependent on the will of the surety, for the surety had absolute control over this land, and could have set the Plaintiff almost at defiance, as it would have been difficult to restrain a sale by him of the property. But no communication whatever was made to him. Some evidence was undoubtedly given at the trial from which it might be inferred that he would have assisted the bank rather than the Plaintiff, because he said he considered the present action dishonest. But that is no evidence of what he would have done some months before if he had been asked not to pay the money, and we have no right to make any assumption one way or the other. In point of fact, the Plaintiff never spoke to the surety, never consulted him. He took it for granted that the advice he received was the wisest and best, and acted on it. The verdict cannot be sustained. The rule will be absolute to enter a nonsuit.

Rule absolute for a nonsuit.

1869.
HARRIS
v.
THE
NATIONAL
BANK.

1869.

Dec. 3, 24.

RUSSELL v. PARKINSON.

RULE nisi to enter a verdict for Defendant.

The words "within a period" in sec. 10 of the "*Amending Land Act 1865*," as read by the light of sec. 21 mean "at a date," i.e., land may be proclaimed by the Governor-in-Council open for selection after a certain date not more than three months from the publication in the *Gazette*, and after that date such land is open for selection. Therefore, where land was gazetted as open for selection on a certain day, and was selected on the next day,

Held, that this was no objection to the selector's title.

Where leave is reserved to the Court to draw inferences as a jury, and the jury have found a verdict on a question of fact for the Plaintiff or Defendant, there being evidence both ways, the Court will not disturb the finding of the jury.

Under paragraph 4 of sec. 14 of the "*Amending Land Act 1865*," the covenant to make improvements, is to make them within a certain time, and the condition cannot be complied with after that time. Therefore a breach of that covenant is not a continuing breach, and may be waived by the Board, as, for instance, by receiving rent after knowledge of the breach.

The permitting another to run stock on land leased under the "*Land Acts*" (the covenant for improvements not being complied with) is not a breach of the covenant not to assign, it is only a licence to agist.

This was an action of trespass, to try the right to land in the area of Ballyrogan. The Plaintiff had been for some years a servant in the employ of one *George Thompson*, a squatter, upon whose run the land was situated. Being proclaimed part of an agricultural area, the Plaintiff applied for and was declared the selector of it. *Thompson* advanced the money for the first half-year's rent, but nothing was done to the land for some time. In the beginning of 1866, the Plaintiff left the district and did not return for eighteen months. In the meantime *Thompson* had paid the rent, had fenced in part of the land, and had fed his sheep on it. Plaintiff on his return put up a hut and began to cultivate, but the improvements required by the Act to be made within two years from the date of the lease were not made. The Board of Land and Works, however, continued to receive the rent, but on 28th September, 1868, on the information of *Parkinson*, the Defendant, the lease was declared forfeited on the ground that the Plaintiff was only a dummy of *Thompson's*. On the 29th September the land was gazetted as open for selection, and on the 30th the Defendant took up the land, and a lease was issued to him. The jury found for the Plaintiff.

Fellows and Dobson shewed cause.

1869.
RUSSELL
v.
PARKINSON.

Higinbotham and Wrixon for the rule.

The arguments of counsel appear fully in the judgment of the Court.

Cur. adv. vult.

STAWELL, C. J.—In shewing cause against this rule it was urged that Defendant had no title, the lease to him having been improperly granted; and even supposing the Plaintiff had no title, still being in possession, he could hold against a wrong-doer who had no better title. This question depends on the construction of the "*Amending Land Act 1865*," sec. 10. That section provides that the Governor-in-Council may from time to time proclaim land in agricultural areas as open "within a period of not more than three months from the date of such publication for selection or purchase. After the expiration of such period, such lands may be selected or purchased." The section is certainly difficult of construction. According to the strict letter of the enactment the lands are to be open for selection during a certain period, and at the expiration of that period they may be selected. It is impossible to reconcile the different parts of the section with each other. We think, however, that the objection is met by reference to section 21, which provides that land shall remain open for selection till withdrawn or selected; and that the words "within a period" in section 13 must mean at a date. The land may be proclaimed by the Governor-in-Council open for selection after a certain date not more than three months from the publication; and after that date the lands may be selected.

The objection of the Plaintiff to the Defendant's title cannot therefore be sustained, and we must consider the objections by the Defendant. His first is that the Plaintiff

1869.
RUSSELL
v.
PARKINSON.

violated section 15 of the Act in taking up the land as agent for another—to express it colloqually, that he was a “dummy.” At the trial leave was reserved to the Court to draw inferences as a jury would, but this question of agency was that on which the verdict of the jury turned. The jury found that the Plaintiff acted *bona fide*, and was not a dummy; and though we have power reserved to us to draw inferences of fact as I have said, I do not think that we are at liberty, even if we were so disposed, to find in direct opposition to the jury when there was ample evidence to sustain their finding. We expressed a similar opinion in *Bruce v. The Queen* (x) where a similar power was given us.

There still remains the question of whether there was a breach by the Plaintiff of the covenant of the lease. As to the improvements, there was unquestionably a violation; but there was a waiver of the breach by the landlords, the Board of Land and Works, who accepted rent after knowledge that the improvements had not been made. It was urged for the Defendant that the covenant was a continuing one. A close examination of the section does not support this view. Paragraph 2 of section 14 provides for a covenant that lessees will not assign the lease, or transfer or sub-let for three years from the commencement of the term, nor at any time unless the improvements in the condition therein after mentioned shall have been previously made and certified as therein provided. Paragraph 4 provides for a covenant for re-entry in case substantial and permanent improvements shall not be made before the end of the second year of the term. That is a covenant to do a certain act within a certain period, and it is impossible to comply with the condition after that time. The covenant not to assign before the third year, nor at any time unless the improvements are made, is a prohibition against assigning,

(x) *Ante*, Vol. II., L., 193.

not a covenant to make improvements at any time. Paragraph 3, providing that if the lessee shall reside on the land and make improvements the Board will give a Crown grant, is a covenant by the Board, not by the lessee. We think the meaning of the Act is, that if the improvements are not made in two years the lease will be forfeited, but the Board may, if it chooses so to do, waive the forfeiture. If the lessee does not make the improvements, he cannot assign till he does make them; and if he never effects them he does not get the Crown grant. It is said that the Plaintiff's conduct with *Thompson* in permitting him to run stock on the land was a breach of the covenant not to assign. That however at the outside, was only a licence to agist stock; it is not an agreement for a lease.

1869
RUSSELL
v.
PARKINSON.

Rule discharged.

REGINA v. McMEIKAN AND REID.

RULE *nisi* for leave to file a criminal information against the Defendants for a nuisance. Only one point of any importance was raised. The application was on the information of the Flemington Municipal Council. Previously to this application, they had summoned the Defendants before the local Police Court for causing a nuisance on the 9th November, 1869, but the justices dismissed the case on the ground that it was not proved that the place was a nuisance on that day. On this application being made to the Court it was urged (*inter alia*) that it was not the practice of the Court of Queen's Bench to interfere where assistance had been sought from other tribunals and refused.

Dec. 8, 21.
Sec. 13 of 15 Vic., No. 10, confers on the Supreme Court larger powers as to the granting of criminal informations, than the Court of Queen's Bench possesses.
Leave to file a criminal information for a nuisance granted, where proceedings before a Police

Court, against the Defendants, for the same nuisance, had been dismissed.

1869.
REGINA
v.
McMEIKAN.
—
December 24.

PER CURIAM.—The 15 *Vic.*, No. 10, sec. 13, confers larger powers on the Supreme Court than the Court of Queen's Bench possesses, and this Court has a discretion as to granting criminal informations.

Rule absolute.

END OF HILARY TERM.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Victoria,

IN ITS

INSOLVENCY, ECCLESIASTICAL, AND MATRIMONIAL JURISDICTION.

IN RE ALEXANDER MCGREGOR MACKINNON,
AN ALLEGED INSOLVENT.

ORDER *nisi* for compulsory sequestration.

Mr. *Molesworth*, for the alleged Insolvent, took a preliminary objection that the summons was not in the Queen's name and was addressed to no one, but was merely headed—"In the Supreme Court," &c.: "In the matter of the Petition," &c.; and was not, therefore, a process of the Court within the meaning of section 20 of the "*Insolvency Statute*:" *Com. Dig.*, "Process" A, 2; *Drury v. Davenport* (a); *Hall v. Reddington* (b); *Moore v. McGann* (c).

(a) 6 Dowl. P. C., 162.

(b) 5 M. & W., 605.

(c) 16 M. & W., 95.

sec. 20 of the "*Insolvency Statute*," and rule *nisi* for compulsory sequestration discharged with costs.

A petition for compulsory sequestration must state that the alleged insolvent had property in Victoria at the time the alleged act of insolvency was committed; and it is not sufficient to allege the existence of property in Victoria at the time of the petition.

1869.

March 4, 6.
April 29.
May 19.

A summons was headed "In the Supreme Court," &c.; "In the matter of the Petition," &c.; but was not in the Queen's name, and was not addressed to any one.

Held, that the summons was no sufficient "process" under

1869.
 INSOLVENCY.
 —
In re
 MACKINNON.

Mr. *Lawes* for the Petitioning Creditor.—The Sheriff has taken upon himself to act upon the summons, and its informality is now immaterial. Appearance for the Insolvent dispenses with the necessity for service of the summons and cures any defect in it: *In re Brann* (*d*).

Mr. *Molesworth* in reply.

MR. JUSTICE MOLESWORTH stated that he would inquire into the practice as to the form of summons generally in use; and on 6th March discharged the rule, with costs, holding the summons to be insufficient by reason of the omission.

April 29.

Another order *nisi* was subsequently obtained for compulsory sequestration of the estate of the same person.

Mr. *Lawes* now moved this order absolute.

Mr. *J. W. Stephen*, for the Respondent, took a preliminary objection.—It does not appear by the petition as recited in the order that the Insolvent had property in Victoria at the time when the alleged act of insolvency was committed. Section 13 of the statute makes the “having property within Victoria” at the time the act is committed essential to the jurisdiction. The order must shew on its face all that is necessary to give jurisdiction: *In re Lawrance* (*e*). The language of the Act must be followed, and the offence charged appear specifically upon the petition: *In re Chambers* (*f*).

Mr. *Lawes* for the Petitioning Creditor.—The intention of the section is to give jurisdiction wherever there is

(*d*) *Ante* Vol. III., I.E.M., 6.
 (*e*) 2 W. & W., I.E.M., 45.

(*f*) 1 W. & W., I.E.M., 172.

property upon which the order of sequestration can operate, and it is immaterial whether the Insolvent has property in Victoria at the time when the offence is committed.

1869.
INSOLVENCY.
In re
MACKINNON.

Mr. J. W. Stephen in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH (after stating the facts).—As I have heretofore understood the language of the section, the words “property in Victoria” had reference to there being something to distribute among the creditors; and it was sufficient to allege and prove the existence of property at the time of the petition, and not at the time of the alleged act of insolvency. But looking more carefully at the section, I have changed my opinion; and I now think that part of the ingredients of the insolvency is having property in Victoria at its date, otherwise the language of the section would have been—“If any person having any property, real or personal, in Victoria shall have departed therefrom, or shall have remained absent,” &c. I am rather inclined to think that the intention of the Legislature was the other way, and that the real motive for requiring property in Victoria was with reference to that part of the section which related to fraudulent alienations within the colony or elsewhere—that is, if a man resided out of the colony but had property here to operate upon, a fraudulent alienation would be an act of insolvency. The grammatical construction of the section is, however, too strong to admit of interpreting it according to my previous impression; and I shall, therefore, discharge the rule, but without costs. This is the first time the objection has been taken, and I wish to call attention to it, as correcting an old misapprehension. The forms of precedents in *Burton* do not contain anything about having property in Victoria; but I think that henceforth the petition and affidavit should run—“having at the time of the alleged act of insolvency, and now having property in Victoria.”

Rule discharged, without costs.

May 19.

1869.

April 22, 29.

The Commissioner has jurisdiction to suspend or refuse a certificate at his discretion, although no one appears to oppose the granting of the certificate; but in such a case he should state the grounds of his objection to granting the certificate, so as to afford the insolvent an opportunity of answering them.

IN RE MARTIN MARSHALL, AN INSOLVENT.

APPEAL from the refusal of a certificate. No opposition had been offered by any creditor, or by the official assignee, to the granting of the certificate; but the Commissioner had refused it *mero motu*.

Mr. *Lawes* for the Appellant.—Section 102 provides for opposition by an official assignee or creditor, but in the absence of any opposition, an insolvent complying with the provisions of the Act as to application for a certificate, is entitled to receive one, as a matter of course. In such a case the Commissioner is not called upon to exercise any discretion. If this were not so, a duty would be imposed upon him, which he has no means of performing, and the assignees and creditors would be relieved from a responsibility which the Act intended should rest with them. The Insolvent is entitled to written notice of the charges against him, but the Commissioner has not furnished any. On the facts the certificate should have been granted.

Cur. adv. vult.

April 29.

MR. JUSTICE MOLESWORTH.—It is objected in this case that the Commissioner has no jurisdiction to refuse the certificate, unless at the instance of some person interested in opposing it. I cannot accede to that view. The Act directs the Commissioner to inquire into and deal with the case, and if satisfied that the Insolvent has conformed to the Act, to grant a certificate, but not otherwise. It gives persons interested the right to be heard; but does not disable the Commissioner from dealing with the case, if no one wishes to be heard. He is as fully authorised to refuse or suspend, as to allow. In this case, inquiries

shewed the creditors that there was nothing to be got. They may not have been sufficiently public spirited, or sufficiently vindictive, to prosecute the matter further. They had prosecuted it to some extent, and the Commissioner very properly took it up where they stopped; an exercise of jurisdiction which might with advantage be more frequent.

1869.
INSOLVENCY.
In re
MARSHALL.

There are no written charges against the Insolvent. No general rule of Court makes them necessary, but in practice it has been found convenient to require them; and I think where the Commissioner acts as prosecutor and judge, he should state his objections in specific form, and not leave the insolvent to guess, out of the multitudinous examinations, what was weighing on his mind. If the Insolvent had asked me to take further evidence in this case, I would have done so, but he has not. [His Honor then expressed his concurrence with the Commissioner upon the evidence; dismissed the appeal, and affirmed the refusal of the certificate.]

IN RE R. D. IRELAND, AN INSOLVENT.
EX PARTE JAMES MADDERS.

AFTER the Insolvent had obtained his certificate, *James Madders*, a creditor, requested the Official Assignee to apply to the Court for an order for the Insolvent's examination, under section 87 of the "*Insolvency Statute*." The Assignee at first consented, but afterwards refused, to make the application. The creditor now moved for an

July 8.

On motion by a creditor for an order to compel the official assignee to apply for an order, under sec. 87 of the "*Insolvency*

Statute," for the insolvent's examination after certificate,

Held, that the Court had no jurisdiction to make the order, the power and discretion as to applying resting solely with the official assignee; but the official assignee not having made any affidavit explaining his refusal to apply, motion refused without costs.

1869.
 INSOLVENCY.
 —
In re
 IRELAND.

order to compel him to make it, upon an affidavit stating that certain facts had been communicated to the Assignee by the applicant, on which he considered an examination would be of advantage to the creditors. The Assignee made no answering affidavit.

Mr. *Atkins* for the Creditor.—The motion is based not on the 87th section alone, but on the general jurisdiction of the Court over the Official Assignee as its officer. He gives no reasons for refusing to exercise the discretion vested in him for the benefit of the creditors. A fair *prima facie* case for inquiry is made out, and no explanation of the apparent neglect of duty is afforded. The facts must be taken as admitted, and being admitted it is clearly for the benefit of the estate that an order should be made.

Mr. *J. W. Stephen* for the Official Assignee.—The assignees are only officers of the Court in matters as to which they are expressly made so. In this instance the Assignee is only a trustee for the creditors and Insolvent. If the Assignee is guilty of misconduct, he can be removed; but his discretion cannot be controlled by the Court. He is not obliged to give any reason for the course he takes. Section 87 does not enable any one but the Assignee to make the application, and the order cannot be made where he refuses to apply. The expediency of applying is solely for his consideration.

Mr. *Atkins* in reply.

MR. JUSTICE MOLESWORTH.—I believe that formerly Judges used to grant Orders under this section on behalf of creditors; but they ought not to be made unless the Assignee applies. Assignees should consider the interests of the creditors exclusively, and rarely refuse when asked to apply and indemnified. I have merely to say that, under the Act, the power of discretion rests solely with the

Assignee. I have no jurisdiction to make the Order. As to costs, I think the Assignee should have answered more fully. He does not approach any of the particular matters alleged by the creditor, or say that he has exercised any discretion. He has merely refused, and, as far as I have materials for judgment, improperly refused. The motion will be refused, without costs.

1869.
INSOLVENCY.
In re
IRELAND.

IN RE EDWARD WHITE, AN INSOLVENT.

July 15, 16, 27.

APPEAL by the Insolvent against the refusal of his certificate. The Commissioner refused the certificate on certain grounds disallowed on appeal, on others not adjudicated upon, and also on the ground sustained on appeal—that he had given a fraudulent or unjust preference to the Bank of Victoria, a creditor. The Commissioner reported the Insolvent for punishment. It appeared that the bank had obtained a writ against the Insolvent for the debt, the payment of which constituted the preference, and that he had kept out of the way to avoid service. The other facts material to the decision are set out in the judgment.

Payment to a creditor who has taken out a writ and is pressing for payment, may be an unjust and fraudulent preference within the meaning of sec. 103 of the "Insolvency Statute," so as to be good ground for the refusal of a certificate.

Mr. *Michie*, Q.C., Mr. *Fellows*, and Mr. *A'Beckett* for the Appellant, as to the objection sustained, relied upon the principle that, in order to have avoided payment to a creditor as a fraudulent preference under the English Bankruptcy Law, it must have been without pressure or threat of pressure, citing *Archbold's Bankruptcy*, 11th edit., p. 310.

Seem, that the fraudulent and unjust preference for which a certificate should be refused, is not necessarily one which could be avoided as a fraudulent preference under the Act.

Mr. *Lawes* for the opposing Creditor, as to the payment, submitted that it was not shewn to be the result of the creditor's pressure, so as to avoid the character of fraudulent preference.

1869.

INSOLVENCY,

In re
WHITE.

July 27.

Mr. A' Beckett in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH:—

The insolvent in March, 1866, purchased 2,500 sheep from Messrs. *Smith* and *Cattenach*, the opposing creditors, for £1,000, payable by bill at six months. In September, 1866, when this bill fell due, he was liable to various creditors, of whom Mrs. *Reid*, of Adelaide, obtained a judgment at that time, and the Bank of Victoria was suing for an overdraft. He then had some lands, worth at most about £1,500, subject to a mortgage for £1,000, and 2,000 sheep, the survivors of the 2,500, forming almost all his property. On the 19th October, 1866, he entered into an agreement with his brother *James* to sell him the equity of redemption and the sheep for £1,500, payable in three months—the sheep, I should say, representing at least two-thirds of that value. I think there is much reason to suspect that this sale was altogether colourable, or at all events was effected with the intent to convert his property into such a shape that his creditors could not get at it; but the learned Commissioner acquitted the insolvent on those charges, and he was not therefore called upon distinctly to meet them before me, and I think I should not act upon my suspicions. Taking the transaction as unimpeachable, the purchase-money remained in his brother's hands for some time, and then insolvent alleges that £400 cash was paid, and two bills at two and four months given to him by his brother; and that he applied the cash and bills in paying various creditors, including a compromise with Mrs. *Reid*, and payment in full to the Bank of Victoria, March, 1867. During the interval between October and March the insolvent corresponded with *Smith* and *Cattenach*, seeking indulgence and offering security.

I think his thus applying funds principally arising from sheep bought entirely on a credit expired, in payment of other creditors, was a preference of which *Smith* and *Oattenach* might complain as fraudulent and unjust. The objection taken before the Commissioner was upon the payments to Mrs. *Reid*, and the bank; and the latter was one of the objections upon which the certificate was refused. I would more readily have said that a payment to any large creditor not pressing was fraudulent and unjust, for payments to pressing creditors could not be avoided in civil proceedings against them. But I think, on consideration, with some doubt, that the fraudulent and unjust preference for which a certificate should be refused, is not necessarily one which could be so avoided.

1869.
INSOLVENCY.
In re
WHITE.

I cannot so clearly understand the insolvent's prospects when he bought the sheep as to adopt the Commissioner's view, that he bought without intending to pay, or having reasonable expectation of paying. I do not express an opinion upon the misconduct of untruly pleading "Never indebted" in a suit by *Smith* and *Oattenach*, and avoiding service of the rule *nisi* for sequestration. I affirm the refusal of the certificate on the ground of fraudulent and unjust preference. I shall not order punishment. No costs.

Appeal dismissed without costs.
Certificate refused.

1869.

April 22.

May 19.

September 18.

A creditor having a bill of sale over insolvent's furniture as security for his debt, and claiming a lien on two deeds, gave up the deeds and agreed to a sale of the furniture by the official assignee on his behalf, the assignee consenting to his proving on the estate for the deficiency. This proof, when tendered, was opposed by the insolvent as forbidden by sec. 81 of the "Insolvency Statute," and was rejected by the Commissioner.

Held by the full Court, affirming *Molesworth, J.*, that the proof was properly rejected.

An appeal under 19 *Vic.*, No. 13, sec. 4, lies to the full Court from the order of a Judge made in Chambers on summons, by way of appeal from the Chief Commissioner's rejection of proof of debt.

IN RE GEORGE KINGSLAND, AN INSOLVENT.
EX PARTE WARBURTON.

WARBURTON, a creditor, held as security a bill of sale over Insolvent's furniture, and claimed a lien upon two deeds deposited with him by the Insolvent. By agreement between the Official Assignee and the creditor, it was arranged that the deeds should be given up, and the furniture be sold by the Assignee on behalf of the creditor; he being at liberty to prove on the estate for the balance of his debt, if the security proved insufficient. The deeds were accordingly given up, and the furniture sold not realising the amount of the debt, the creditor sought to prove for £80, the deficiency. The Insolvent opposed the proof, which was rejected by the Chief Commissioner, on the authority of *Riordan's case (g)*, referred to in the judgment of Mr. Justice *Molesworth*. From this refusal the creditor appealed by summons in Chambers. Mr. Justice *Molesworth* referred the summons to a Court hearing.

Mr. *J. W. Stephen* for the Creditor.—Section 81 of the "Insolvency Statute" only applies to cases in which assignee and creditor differ as to the value of the security, and in which the assignee has no opportunity of ascertaining its value or option of redeeming it. Conceding the correctness of *Riordan's case*, it has no application where the assignee consents to the sale, as he did in this instance. In that case the assignee knew nothing of the nature or value of the security. The only object of the section is to prevent a secured creditor receiving more than twenty shillings in the pound, and to enable the assignee to take a deficient security at its value. If this election be given to

(g) *In re Riordan*, 28th July, 1859.

the assignee, it is immaterial how he exercises it. The section is satisfied by the assignee having had the election. The assignee has an implied power of bargaining with a secured creditor. No dispute ever arose here as to the value of the security within the meaning of the section. The creditor gave up deeds on which he claimed a lien, and the arrangement between him and the assignee was for value, and cannot be impeached by the insolvent.

1869.
INSOLVENCY.
In re
KINGSLAND.

Mr. *Miller* for the Insolvent.—The assignee's hands are tied by the section. He cannot make a bargain, as in this case, to sell as the creditor's agent or concur in the sale. The Act regards a secured creditor with jealousy; and, in the interest of the other creditors, proof by secured creditors is only permitted upon conditions which, in this instance, have not been, and cannot be, fulfilled. To permit such an arrangement as was made in this case, would afford every facility for collusion and fraud.

Mr. *J. W. Stephen* in reply.

Our. ado. vult.

MR. JUSTICE MOLESWORTH.—In this case a creditor obtained the security of a bill of sale of the insolvent's furniture. Afterwards, by arrangement between that creditor and the official assignee, the official assignee sold the furniture in question, which realised a sum short of the debt due by the insolvent, and the creditor has sought to prove for the balance of the debt. The learned Chief Commissioner rejected the claim, on the ground of the 81st sec. of the "*Insolvent Act*," and the matter was brought before me by way of appeal from him. It was decided a great many years ago in this Court by my brother *Barry*, in the case of *Dennistoun Brothers* (*h*), that a creditor having realised a security before proof of his debt disabled himself from

May 19.

(*h*) *Argus*, 12th August, 1859.

1869.
 INSOLVENCY.
 —
In re
 KINGSLAND.

putting a value upon his security, as required by this section, and deprived himself altogether of the right of proving; and that decision has never been reversed. A case came before me afterwards—*Lang v. Laidlaw* (j)—in which I held that the valuation by affidavit originally made by a creditor was not conclusive upon him, and that the official assignee had no right to treat him as having valued by that original affidavit, so as to subject himself to having the property taken by the assignee at that valuation, but that he should have an opportunity of reconsidering the valuation he put upon the property. That, however, has nothing to do with the present case. Here there has been no valuation whatever put upon the property, and the question is whether there is anything in the circumstances of this case (the sale being effected by the official assignee, with the concurrence of the creditor) to take it out of the principle of the decision to which I have before adverted. It is not necessary to say how the case would be if there had been an original affidavit of proof of debt, and afterwards some adjustment was made as between the official assignee and the creditor, so as to come under the expression in the Act “if any dispute shall arise.” There are a great many protections to the estate arising from the system required by the “*Insolvent Act*.” The necessity of the creditor making an affidavit pledges his conscience to the true value which he thinks his security ought to bear. Then the affidavit calls the attention of all the creditors who are interested in the subject matter, to the question, how far they should protect their rights with reference to it; and it preserves evidence of the fact upon the records of the Court, instead of leaving it afterwards to rest upon parol evidence. In addition to that the assignee selling, is a trouble which the assignee takes, for which he ought to be paid. It entitles him to that payment without the alternative, perhaps, of things taking such a course as that a sale would be unnecessary. In addition to all that, the system which has been here adopted enables the assignee,

(j) 1 W. & W., Eq., 18.

in fact, to admit the debt without any opportunity of its being canvassed, or at all events easily canvassed. I may suppose a case in which the debt and the security are pretty nearly of the same value, or in which the security is worth more than the debt. The system here adopted would amount to this, that the debt would be paid in full without the attention of the creditor being called to it, and without any means of ascertaining the validity of the debt at all.

1869.
INSOLVENCY.
In re
KINGSLAND.

I have dealt with this case entirely as an abstract question, and merely upon the construction of the Act; and decide that it is not competent for the official assignee and a creditor, to arrange between themselves that there should be no affidavit of valuation of the debt, but that the official assignee should sell the property by auction, and consider the price realized as the value of the security. For this reason I concur in the opinion of the learned Chief Commissioner, and dismiss the appeal with costs. I will make the Order as a Chamber Order, and certify for counsel.

The Order was drawn up and signed as an Order in *September 18.*
Chambers. The creditor appealed to the full Court (*k*).

Mr. *J. W. Stephen* and Mr. *Lawes* for the Appellant.

Mr. *Miller* for the Insolvent took a preliminary objection. No appeal lies as this is not an Order of a Judge sitting as the Court, and within the meaning of section 4 of 19 *Vic.*, No. 13; it is an Order of a Judge in Chambers, not of the Court. Apart from the statute there is no appellate jurisdiction. The appeal cannot be claimed as of right.

THE CHIEF JUSTICE.—We are of opinion that the appeal lies. We think the functions of the single Judge are by the Act subject to appeal to the full Court.

Objection over-ruled.

(*k*) Coram, *Stawell, C. J., Barry, J., and Williams, J.*

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Counsel for the Appellant having been heard, counsel for the Respondent was not called upon.

THE CHIEF JUSTICE.—We think the decision appealed from was right. The protection afforded by the section was intended to enure to the benefit of the unsecured creditors and of the insolvent. It was rightly conceded in argument that the assignee is trustee not only for the creditors, but for the insolvent, and the insolvent is entitled to the opportunity of knowing at what rate the security is valued. The appeal will be dismissed.

BARRY, J.—I am of the same opinion. It would not be right to permit "hole and corner" arrangements, between the assignee and the secured creditor. It is clear that the intention of the section was to insist on an affidavit specifying the value, which would be information available to the general body of the creditors, as well as to the insolvent, in order that they might have an opportunity of directing the assignee as to the course he should pursue with respect to it.

Appeal dismissed with costs.

IN THE ESTATE OF WILLIAM BATEMAN THE ELDER
AND WILLIAM BATEMAN THE YOUNGER, INSOLVENTS.

IN RE WILLIAM BATEMAN THE YOUNGER,
EX PARTE THE BANK OF VICTORIA.

1869.

Aug. 5, 9, 17.
September 27.
October 28.
November 1.

SUMMONS under 5 *Vic.*, No. 17, sec. 100, calling upon *William Bateman* the younger to shew cause, upon the application of the Bank of Victoria, why he should not be imprisoned until satisfaction of the debt due to the said Bank, and proved in the estate of *William Bateman* the elder and *William Bateman* the younger, or until his lawful discharge therefrom.

In and prior to the year 1856, *William Bateman* the elder, and his son, *William Bateman* the younger, carried on business together as merchants, at Warrnambool; and on the 18th December, 1856, their estate was sequestrated. The Bank of Victoria proved upon the estate as creditors for £63,400 9s. 5d., and a dividend of 2s. 6d. in the pound only has been paid in the estate. The Insolvents each applied for a grant of their certificates; and on the 22nd September, 1857, the certificate of *William Bateman* the elder was granted, and that of *William Bateman* the younger refused, by the Commissioner for the Geelong District. The latter Insolvent did not appeal against this refusal, but, after the lapse of two years, applied for a grant of his certificate, under the rider to 10 *Vic.*, No. 14; which

W. B. an uncertificated insolvent, entered into an arrangement with his brother, *J. B.*, for carrying on business in the name of *J. B.* upon payment by *J. B.* of a salary to him, and a portion of the profits to his, *W. B.*'s, wife and children. Subsequently, the business was carried on by *W. B.* the elder, the father of *W. B.*, and large profits made. Application was made by the Bank of Victoria, a creditor prior to the insolvency, for an order under 5 *Vic.*, No. 17, sec. 100, for

W. B.'s imprisonment until payment of the Bank's debt; and it was sworn that the then assets of the business amounted to £20,000. In reply it was sworn that the liabilities of the business carried on subsequently to the insolvency amounted to £32,000, and that such subsequent business was carried on with the knowledge of the bank, and the official assignee of *W. B.*

Order made for the imprisonment of *W. B.* until satisfaction of the debt to the Bank, but that execution be suspended so long as *W. B.* paid £500 every six months in reduction thereof.

It is no defence to an application for committal for disobedience of an order to shew that the order is wrong.

Semble, that the appointment of a successor to an official assignee under 7 *Vic.*, No. 19, sec. 12, would in itself operate so as to transfer particular estates in his hands as official assignee.

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application was refused, on the ground that the clause was only applicable to cases where the refusal by the Commissioner, had been confirmed by the Court on appeal. In July, 1864, he again applied for his certificate, and was again refused, for the same reason (1). In 1858, *William Bateman*, jun., entered into some joint speculations in a tramway and other business, at Warrnambool, with his brother *James Bateman*, and subsequently carried on business under his brother's name, and afterwards under his father's name, in partnership with one *Wilson Hardy*; but, as the Insolvent alleged, for the benefit only of his brother and father respectively, he receiving a salary for his personal services; and, in the first instance, a portion, and subsequently the whole, of the net profits, being, by his brother and father respectively, settled upon the Insolvent's wife and children. The Bank of Victoria now applied for an order for the imprisonment of the Insolvent, upon affidavits stating that the business was in fact that of the Insolvent himself; that he had acquired large sums of money by it, and was now in possession of property of the value of £20,000, or thereabouts. The answering affidavits stated (*inter alia*) that the Bank and the official assignee were well aware, during the whole of the time, that the business was being carried on *de facto* by the Insolvent, but never made any claim upon it; that debts to the extent of £32,000 were now due to subsequent creditors, for which the assets of the business were primarily liable; and that, save such assets, to which the Insolvent was entitled as executor of his father, who died in March, 1868, he had no property or means whatever. The affidavits on either side were very voluminous, but the substance of them is sufficiently stated in the judgment of the Court.

Mr. *Webb*, for the Insolvent, shewed cause.—From the omission to appeal from the original refusal of his certificate, in 1857, which the Insolvent swears was done under

(1) *Vide, In re Bateman, Ante, Vol. I., I.E.M., 35.*

professional advice that he could apply under the rider clause at the end of two years, the Insolvent is now unable ever to obtain his certificate, although it appears that fifty out of fifty-four of his creditors concurred in the request that his certificate should be granted. He is, therefore, and must ever remain, an uncertificated insolvent; and as such, it is admitted, amenable technically to the provisions of the 5 *Vic.*, No. 17, sec. 100. That clause, however, requires proof, to the satisfaction of the Court, that the Insolvent hath reasonable means of discharging the debt, for non-payment of which it is sought to imprison him. The affidavits as to the beneficial interest of the Insolvent in the business carried on by him, are conflicting; but as the present applicants elect to proceed under this penal clause, instead of by an action or suit in which the question might fairly be tried upon *viva voce* evidence, it is incumbent upon them to make out their case very clearly. The balance of the evidence upon the affidavits is, however, it is submitted, in favor of the Insolvent. It is also in evidence and uncontradicted, that there are outstanding liabilities, of the business, whether in fact the Insolvent's or not, to the extent of £32,000; and, even supposing that the Insolvent has, as alleged, £20,000 of assets of the business; they are, in the first place applicable to the discharge of the liabilities contracted since the insolvency, the Insolvent having been permitted by the Bank and the official assignee, *de facto* to carry on the business, whether for his own benefit, or for that of his brother and father. The subsequent creditors have a prior claim to these assets: *Tucker v. Hernaman* (m), *Morgan v. Knight* (n), *Webb v. Fox* (o); and the Court will not deprive them of their rights by withdrawing these assets from them, especially in a proceeding of this nature, where they cannot be heard in support of their rights. The beneficiaries under the will of *William Bateman*, sen., by which all the assets of the

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(m) 4 De G. M. & G., 395.

(o) 7 T. R., 39.

(n) 33 L. J., C. P., 168.

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business are bequeathed to the Insolvent, in trust, ought also to have an opportunity of being heard before they are deprived of the whole of these assets by a summary order, such as is now sought. The present applicants have been guilty of great delay and laches in allowing the business to be carried on for ten years without any interference, and ought not to be favorably considered upon a penal application of this nature. It is submitted, therefore, that this summons should be dismissed, with costs, and the Bank be left to its remedy (if any) against the assets of the business, by proceedings at law or in equity, when all parties interested in the question can be heard.

Mr. J. W. Stephen, Mr. Holroyd, Mr. Lawes, and Mr. Spensley, for the Bank of Victoria, in support of the summons.—This is a proceeding impeaching the *status* of the Insolvent. It is quite clear upon the affidavits that the Insolvent has devoted his skill and personal ability to the enrichment, if not of himself, at all events of his wife and children, whilst he leaves his creditors altogether unpaid; and this the law will not allow. Having “reasonable means of discharging the debt” does not mean immediately available means, but having the facility for acquiring means. [*Molesworth, J.*—If I made an order that he should be imprisoned until he paid a sum of money to his assignee, that would not be final. He might pay that amount, and be subject to a renewed application from day to day. Another creditor might obtain a similar order the next day; and that liability would completely tie his hands from making any arrangement to raise money to pay any amount I might order upon this application.] If another creditor came next week, he would have to bring forward fresh facts, shewing that the Insolvent had then “reasonable means” of paying, having regard to the sum he had already been ordered to pay. We do not wish to interfere with his business; but if he is making a large income from it, he ought to pay something towards the liquidation of his old

debts. It is not necessary that he should be imprisoned for nonpayment of the whole debt. An order may be made for payment of a certain sum, or for imprisonment in default of payment. As to the alleged laches of the Bank, it is only recently that the Bank discovered the Insolvent was beneficially interested in the business, which was not being carried on in his own name; and this distinguishes this case from *Tucker v. Hernaman*, and that class of cases. Upon the affidavits, it is clear that the use of his father's and brother's names was a mere artifice to conceal the property, and the profits of his business, from the creditors of the Insolvent.

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Cur. adv. vult.

MR. JUSTICE MOLESWORTH:—

August 17.

This is a somewhat unusual application, to make an uncertificated insolvent pay something towards his debts, under the Act 5 Vic., No. 17, sec. 100.

The insolvent now sought to be affected, Mr. *William Bateman*, was in trade with his father, of the same name. Their estate was compulsorily sequestrated December, 1856. They applied for their certificates September, 1857, when that to the father was granted, that to the son refused. He omitted to appeal, and therefore his application for a certificate under the rider clause two years after was not entertained. In May, 1858, he embarked in a speculation with his brother, Mr. *James Bateman*, the latter taking a lease of a tramway. His inability to procure a certificate places him under a liability of having any property he may ever acquire made available for his creditors. In order to evade this, he stipulated with *James* for payment of a salary to himself for management, and the payment of a part of the profits to his wife and children. In 1862, he wanted to start in a business as produce merchant, jointly with Mr.

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Wilson Hardy, who objected to a partnership with him, an uncertificated insolvent; and partly from that reason, and partly, I think, to screen his property from creditors, the same brother *James* became the nominal party with *Hardy*, so as to be responsible to *Hardy* and his creditors, but arranging that he and *Hardy* alone should act, and the moiety of the profits go to his wife and family. I cannot make out clearly whether *James* was to have any part of the profits, and the relations between *James* and him led afterwards to dispute and litigation between them. In 1864, he got rid of *James* as the nominal partner with *Hardy*, and concocted a new nominal partnership between *Hardy* and his father, who had then got his certificate, in which the father was treated as entitled to £2,700, the moiety of the accumulated property of the nominal partnership, *Hardy* and *James Bateman*. The father took some ostensible part in the business, signing documents, &c., but no real part in the management of it. I rather think that the son contributed to the father's support, and was, himself and family, supported out of the proceeds. The father really contributed nothing to the capital. In 1866 *Hardy* withdrew from the business, getting as his share of the partnership property £8,600, secured apparently by the father's bills; and subsequently the son carried on the business under the name of *William Bateman & Co*. By way of continuing this system of screening property, the father, who had very little property of his own, and felt himself a trustee for his son as to the business, made a will, November, 1867, and bequeathed his interest in the business to his son *William*, upon trust to pay the father's widow £100 a year, and subject thereto as a trustee for his own wife and children, with authority to carry on the business at his discretion, with a salary, the same that he might receive himself at the time of the father's death, with a provision that if the son obtained his certificate, the bequest to the wife and children should pass to himself. After the father's death in 1868, the son proved this will, after some

opposition from his brother *James*, valuing the father's estate at £19,000. He employed *Hardy* as his agent at £1,000 a year, to partly manage the business up to August, 1868, and has thenceforth managed it himself, nominally as his father's executor, allowing himself a salary of about £500 a year, partly allowing as to his wife and children, and apparently accumulating capital. He says, however, that in his capacity as trading executor he has very large properties and very large liabilities. An affidavit made on behalf of the Bank of Victoria, the original petitioning and opposing creditor and present applicant, states his property so represented as assets of his father as £19,000 or £20,000, which he does not meet with any definite answer, and I think I should treat him as a person of considerable capacity for making money, and who has succeeded in accumulating a large trading capital—I should say at least £10,000—and I have to show that the liabilities of an uncertificated insolvent as to future earnings are not to be eluded by such schemes.

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The order I shall make is, after reciting the summons and evidence, as follows :—

"This Court doth order that the said *William Bateman* the younger
"be imprisoned until satisfaction of the debt due to the Bank of Victoria
"or lawful discharge therefrom; but that the execution of this order be
"suspended until his failure to comply with the condition following, that
"is to say, that if the said *William Bateman* the younger shall, within
"one calendar month of this order, pay the official assignee of the said
"estate the sum of £500, and within twelve calendar months of this order
"pay the said assignee the further sum of £500, and within eighteen
"calendar months of this order pay the said assignee the further sum of
"£500, and so on within every succeeding six months the further sum
"of £500 for the benefit of all the creditors of the estate of *William*
"*Bateman* the elder and *William Bateman* the younger until satisfac-
"tion of the said debt due to the Bank of Victoria, or lawful discharge
"therefrom, then that the said imprisonment shall not take place,
"otherwise that the said Bank of Victoria may apply for the enforce-
"ment of the said imprisonment; and this Court doth further order
"that the said official assignee shall pay out of the first money coming
"to his hands under the order the costs of the said Bank of Victoria
"properly incurred in obtaining this same, and have credit for the same
"payment."

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October 28.

The above Order was (27th September) affirmed on appeal to the full Court.

The case now again came before the Court on a motion by the Bank of Victoria for the imprisonment of the Insolvent for non-payment of the £500 within one month of the previous order. The Order had been drawn up, inserting the name of *James Simson* as the official assignee of the Insolvent: and the affidavit in support of the present motion stated that the Insolvent had not paid the £500 to *Simson*. In opposition to the motion an affidavit was filed that *Richard Learmonth* was duly appointed official assignee of this estate, and that no order appointing any other official assignee had been made.

Mr. *Fellows* and Mr. *Lawes*, for the motion.—The objection to the insertion in the order of *Simson* as official assignee should have been made when the Order was drawn up, or at all events the Order as drawn up having been appealed against by the Insolvent, and affirmed, is now binding upon him. *Simson* has been appointed under 7 Vic., No. 19, sec. 12, as the successor of *Learmonth*, and that sufficiently vests the estate in him and clothes him with the right of his predecessor. [*Molesworth*, J.—The practice has been to make a general order, with a schedule of all the estates vested in the former assignee, transferring all those estates to the new assignee. It was considered that the mere appointment of a successor did not itself transfer the estates.] We submit that the estate vests immediately upon the appointment of the successor, and no order of transfer is necessary.

Mr. *Webb*, for the Insolvent, *contra*.—The question of who was the official assignee in this estate has never hitherto been before the Court. The name of *Simson* is not mentioned in any of the affidavits used on the applica-

tion for the Order, and was inserted by the present applicants in the Order at their own risk, and this is the first opportunity the Insolvent has had of raising the point. It has been held in several cases that the mere general appointment of a successor to an official assignee is not sufficient to vest the estate, but even if it were, there is no evidence even now before the Court of the appointment of *Simson* as successor to *Learmonth*. The only affidavit as to the assignee states that *Learmonth* was the assignee appointed. The Order of the Court as pronounced was for payment to the assignee, and the affidavit upon which this motion is founded only negatives a payment to *Simson*, who, so far as this Court is aware, is a total stranger to the estate. There is, therefore, no breach of the Order shown upon the materials before the Court.

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Mr. *Fellows*, in reply—The Order as drawn up directs payment to *Simson*. The affidavit is that there has been no payment to *Simson*, and that is sufficient. If *Simson's* name was wrongly inserted in the order it might be the subject of a motion to set aside the order, but is no answer to the present application founded on a breach of the order.

Our. adv. vult.

MR. JUSTICE MOLESWORTH:—

November 1.

I made an Order in this case on the 17th August, 1869, that the Insolvent, *William Bateman* the younger, should be imprisoned unless he made certain payments within prescribed times to the official assignee, and this order was drawn out, inserting the name of *James Simson* as the official assignee. The insolvent has paid nothing to anybody, and now resists a renewed application for his imprisonment by alleging that Mr. *Simson* was never his official assignee. It was alleged that his official assignee was Mr. *Learmonth*,

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whom Mr. *Simson* was appointed to succeed, and I have had some discussion as to whether the appointment of *Simson* as successor to *Learmonth*, under 7 Vic., No. 19, sec. 12, would, in itself, operate so as to transfer particular estates in his hands as official assignee, and I have found a case in the Supreme Court of New South Wales an authority for the affirmation: *Humphrey v. Lloyd* (p). But in this case I have no evidence that *Simson* is *Learmonth's* successor, so I am thrown upon a more general principle urged for the applicants—that it is no defence to an application for committal for disobedience of an Order to show that the Order was wrong, the party should apply to vary the Order, not disobey it. I had some recollection of cases in which a party sought to be attached for a breach of an injunction might show that the injunction was wrong, but I find, according to modern authorities, that it is only an excuse to mitigate punishment, not cause against the application: *Russell v. East Anglia Railway Company* (q). If the insolvent was ordered to be imprisoned, with condition staying execution upon his doing an impossibility, in strictness the order would operate unconditionally. I order that *William Bateman* the younger be imprisoned until satisfaction of the said debt due to the Bank of Victoria, or until his lawful discharge therefrom, or until the further Order of this Court.

(p) 3 W. & O., L., 374.

(q) 3 Mac. & G., 104.

IN RE GEORGE KINGSLAND, AN INSOLVENT.

1869.

Sept. 2, 3, 4.
October 1.

THIS case came on to be heard on separate rules *nisi*, obtained by the Insolvent, to strike out from the plan of distribution a debt proved by one *Merfield*; to vary the plan of distribution in certain respects hereafter mentioned; and, on petition, to reduce the commission allowed the official and trade assignees. The three applications were heard as one. The plan shewed a surplus after satisfying all the insolvent's liabilities. It was sought by the rule, against the official and trade assignees, to vary the plan of distribution in his estate in the following (amongst other) particulars:—By disallowing the costs of an equity suit of *Goodman v. Boulton*, which had been instituted by the official and trade assignees, to set aside a settlement executed by the Insolvent as fraudulent against creditors. By disallowing the assignees their costs of certain motions made in the suit by the Insolvent, and refused without costs. By directing the retaxation of costs of the suit, and the costs of the petitioning creditor, such costs having been taxed in the Insolvent's absence. By striking out costs allowed to the petitioning creditor for protecting the estate, examining the Insolvent, prosecuting the Insolvent's son for perjury, and opposing the Insolvent's certificate; and by reducing the commission of five per cent., allowed to the official, and two and a-half per cent. to the trade, assignee.

On rule *nisi* by insolvent to vary plan of distribution, and to reduce commission to trade and official assignees, *Held*, that the assignees are bound to insert every proved debt in the plan of distribution.

Costs of a suit instituted by the official and trade assignees to set aside a settlement by the insolvent as fraudulent against creditors, allowed against his estate. Plaintiffs' costs of certain motions made by the insolvent in such suit, and refused without costs, allowed to be charged against his estate.

Costs of prosecution of the estate, dis-

insolvent's son on a charge of perjury, arising out of investigations in the estate, dis-

allowed.

Costs of opposing insolvent's certificate, allowed.

Observations as to costs to be allowed petitioning creditor. Costs incurred by him in investigating insolvent's dealings, in protecting the estate, and in his appointment as trade assignee, disallowed.

Observations as to insolvent's right to attend taxation of costs.

Commission of £5 per cent. allowed to official assignee, and £2 10s. per cent. to trade assignee.

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Mr. *Fellows* for *Merfield*.—The facts, as admitted by the Insolvent, shew no cause of action upon the bill which has been given up; and the Insolvent's version of the facts is contrary to the evidence.

Mr. *J. W. Stephen* and Mr. *Lawes*, for the official and trade assignees.—*Merfield's* debt having been proved, must be inserted in the plan of distribution. Objecting to the plan cannot be substituted for an appeal, or an application to expunge the proof which is still open to the Insolvent. The giving up of *Merfield's* bill was justifiable under the circumstances, and the Insolvent is not prejudiced, as he can still sue on it. The suit to set aside the settlement was inevitable, as the other assets disclosed and discovered were insufficient. As to the costs of motions in the suit disallowed without costs as against the Insolvent, the exemption from liability for costs was personal only, and did not exempt the estate. The Insolvent's conduct warranted opposition to his certificate, and at the time when it was opposed, the assets were insufficient; no surplus could be anticipated until after the appeal to the Privy Council had been abandoned. The prosecution of the Insolvent's son for perjury, was as to his denial of possession of assets, and was sanctioned by all the creditors. The assignees were justified in undertaking and compromising the prosecution, the charge being a misdemeanor only, and the result the discovery of concealed assets: *Ex parte Dobson* (r). Investigations in which costs were incurred, were rendered necessary by the Insolvent's conduct, and resulted in the recovery of assets. These costs are therefore properly chargeable against the estate. It is immaterial whether they are allowed as petitioning creditors' or trade assignee's costs, as in this instance the same person fills both capacities. It has never been the practice to give the Insolvent notice of taxation of petitioning creditors' or other costs. Many matters com-

(r) 32 L.J., Bky. 1.

plained of were conducted at the suggestion, or with the express approval of the Insolvent.

Mr. *Billing*, Mr. *Miller*, and Mr. *Molesworth*, for the Insolvent, in support of the rules and petition.—*Merfield's* liability on the bill was a contingent asset, and ought to have been so treated on the plan which shews a surplus. This debt, though proved, was an inequitable claim, and he should not be allowed to participate in distribution. *Merfield* was in no respect entitled to have the bill given up to him. Having been given up by the persons entitled to sue, it cannot be sued upon, and the assignees are personally liable to the Insolvent for the consequent loss. The assignee's conduct has been unnecessarily oppressive, as the Insolvent was willing to give up the property in settlement, without suit. If other assets had not been wasted by the assignees, recourse to the settled property would have been unnecessary. As to the prosecution for perjury, the offences of other persons should not be punished at the expense of the estate. There being a surplus, the certificate should not have been opposed; and the Insolvent should have had notice of taxation of costs against the estate. *Warburton* had no right to the security of which he was given the benefit, without price by an irregular sale with the assignees' sanction. The assignees were liable for the value of shares which were sold when marketable.

Cur. adv. v.

MR. JUSTICE MOLESWORTH:—

This case comes before me on an application by the Insolvent, Mr. *Kingsland*, against his official assignee, *Goodman*, and his trade assignee, Mr. *Martin*, to alter the plan of distribution; including in it, by amendment or arrangement, an application to strike out a creditor's d

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and to vary the allowances made by the learned Commissioner to the assignees.

The Insolvent's embarrassment was, in a great degree, caused by a dealing about mining shares in a certain company, which he obtained from Mr. *Merfield* about 22nd February, 1867. Upon that dealing, he and *Merfield* each gave the other an acceptance for £600. The Insolvent's being unpaid, *Merfield* sued him at law, the Insolvent defended, and pleaded that his acceptance was for accommodation. The case was tried 3rd August, 1867, both parties and their witnesses were examined, and there was a verdict for Plaintiff. The Insolvent gave a version of the transaction, which he still says was true; but he insists that, according to the evidence *Merfield* then gave, the cross acceptance was to indemnify him in the event of the mining company failing, which he says occurred 26th August, 1868; and that, though he might properly have been defeated at the trial, the cross acceptance then became enforceable. *Martin*, now the trade assignee, got a judgment against Insolvent, issued execution, obtained a rule *nisi* for compulsory sequestration, 29th August, made absolute 12th September, 1867. About the same time, Insolvent, not satisfied with *Merfield's* verdict, endorsed the bill to a person named *Hennesy* to sue for on his behalf, and *Merfield* taking defence, *Hennesy* allowed a *non pros*. *Hennesy* afterwards gave up the acceptance, and it passing through several hands, apparently *Goodman's*, though he forgets it, came to the hands of Mr. *Wyburn*, who was the solicitor of *Merfield*, *Martin* & *Goodman*, and he handed it over to *Merfield*, who destroyed it. *Wyburn's* excuse is that he thought the result of the case *Merfield v. Kingsland* shewed that the bill was of no value. *Kingsland* filed a schedule in the insolvent matter 9th October, 1867, in which he admitted his liability on *Merfield's* judgment, and inserted the cross acceptance as a debt due to him under column bad or doubtful. He says

he was not aware of the acceptance being handed to *Merfield* until 7th February, 1868. *Merfield* had previously proved his debt without objection by *Kingsland*; and properly, if the cross acceptance was to take effect on a future contingency.

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The first amendment sought in the plan of distribution is to reduce *Merfield's* demand by £600, but that I have no power to do, deciding a very doubtful case against him; and *Merfield* having been made a party to the rule, I think I must give him his own costs of discharging it. *Wyburn* was wrong in giving him the bill; he not wrong in taking it. The assignees were bound to insert a proved debt in the plan of distribution.

Pursuing the subject of this cross acceptance, the assignees should have inserted it in the plan as an outstanding asset, and I shall direct them to do so as "a claim upon a bill accepted by *James William Merfield*, drawn by the Insolvent, dated 22nd February, 1867, for £600." But I have been urged to go further, and charge the assignees with the amount as lost by their default. Without entering into the contest of facts between *Merfield* and *Kingsland* about it, I may say that *Kingsland's* schedule described it as bad or doubtful, and he never requested the assignees to sue upon it. I apprehend they were, and are, entitled to sue upon it, if it is fairly due. *Merfield* having destroyed it would excuse its non-production. The circumstance of its being given up as it was, should not prejudice the case with a jury. I am disposed to make it a condition to the retention of the benefits given to them by the plan, to make the assignees allow *Kingsland*, he indemnifying them against costs by proper security to be approved by the Commissioner, to sue upon it in their names.

The next point presented by the rule *nisi*, relates to soda-water machinery and chemicals of *Kingsland's*, which

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he alleges that the assignees sold carelessly and at great undervalue. He alleges as to machinery, that what cost him £700 was sold in one lot for £210, against his protest; and he is corroborated by Mr. Prevôt, who purchased it, and says it proved worth £500, and was injudiciously sold in one lot. This is met by *Goodman*, who says it was carefully sold, with the approbation of *Kingsland* and his son, under the advice of Mr. *Bliss*, and that *Kingsland* spoke as well satisfied with the sale, and *Bliss* corroborates this. The chemicals were sold in a number of lots, which does not look like hasty neglect, and I should say myself as to machinery used for a common object that it would generally not be judicious to subdivide. I much regret, and would check, the extreme sacrifice of insolvent's property which occurs by hasty sales; but feel that such can never bring near the same prices that an owner, taking his own time, and using his own exertions, would procure. On the balance of evidence, I cannot charge the assignees with wilful default in the matter.

The next definite point is to disallow the very heavy costs of an equity suit, *Goodman v. Boulton*, by which the assignees succeeded in breaking a voluntary settlement made by *Kingsland* upon his family, and by the sale of property included in it, realising enough to pay all the creditors in full; on the ground that *Kingsland's* other property was sufficient, with proper management, to have paid all. The argument is, that the first seven items of property received are admitted to have produced £576 17s. 1d.; the debts were £1,059 18s. 9d.; £600 should be struck off from *Merfield's*, leaving only £459 18s. 9d. The argument at once fails if *Merfield's* debt is not to be reduced—if the assignees could not reduce it; but besides this, *Kingsland's* schedule presented debts, £370 as admitted, though they have never been proved and the assignees should provide for them, and £200 to Mr. *Warburton* otherwise disposed of. And besides, a

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large sum had been incurred for the costs of the petitioning creditor.

The next point of objection is the insertion of the costs of motions in the suit of *Goodman v. Boulton* made by *Kingsland*, and refused without costs. They were motions to enlarge the time of appealing, and to stay sales under the decree, which it was necessary for the assignees to resist, for the protection of the creditors. There was a wide difference between saying that *Kingsland* should not personally and immediately be charged with these costs and that the assignees as between them and the estate realised, should be left to abide them.

The next ground of objection is that the estate is charged with costs taxed *ex parte*. This is generally the case, and I fear is a cause of considerable abuse. But it is not easy to say that all creditors have a right to be present at the taxation of petitioning creditors' or assignee's costs, and the insolvent himself has rarely any real interest in the matter. In this case, accidentally, he has—the creditors being paid in full—and in the equity taxation appears to have attended, though his power of objection appears to have been somewhat restricted. But there is a large bill of costs of *Martin's*, as petitioning creditor, as which he was not entitled to, and did not attend, which has been taxed at £279 1s. 11d., as it appears to me, under a great misapprehension of what petitioning creditors' costs should be. £70 about of these costs are incurred up to making absolute the rule *nisi*. Then follow a number of costs of measures taken for the protection of the Insolvent property, and discovery of objectionable dealings, and examinations, which it is not the business of a petitioning creditor to do; some which an assignee might do and be allowed for, but *Martin* was not trade assignee until 2 October, 1867; and there are a set of charges allowed about the appointment of him as trade assignee. There

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a class of items allowed in this bill of costs especially objectionable. A son of *Kingsland*, on his examination, stated a collateral fact upon which it was found he could be contradicted, and *Martin* thought it expedient to institute a prosecution against him for perjury, in order to extort from him and others the surrender of property of *Kingsland* improperly withdrawn from the creditors, and appears to have attained that object. The authority relied upon as sanctioning this is *Dobson, ex parte*. In it the Lords Justices in England had directed the prosecution of a bankrupt for misdemeanour under 24 & 25 *Vic*, cap. 134, the expenses of which should be defrayed out of public funds. Friends of the bankrupt subscribed funds for a dividend for the creditors, conditional on the discontinuance of the prosecution, and the Court sanctioned its discontinuance upon the terms proposed. This is quite a different thing from saying that a petitioning creditor may institute a prosecution for an offence, not an insolvency offence, against a relative of an insolvent, in order to procure concessions from that relative as to the insolvent's estate, and have the costs of doing it out of the insolvency funds. The 17th section of the Act directs that the petitioning creditor shall at his cost prosecute all the proceedings in the sequestration until the second meeting, and the assignees shall reimburse him. The proceedings intended are, I apprehend, the calling of meetings, &c., not such as I have referred to. I shall direct the costs of the petitioning creditor to be re-taxed in the presence of *Kingsland's* solicitor, and the allowance in the plan of distribution to be reduced according to the result.

The next point of objection is charging *Kingsland's* estate with the costs of opposing his certificate, which succeeded, as he withdrew his application for it. The Act indicates the assignees as the persons to oppose, and they are usually, I think, properly allowed such costs. These costs began before 19th May, 1868, when the full Court,

reversing my decision, made the settled property liable for *Kingsland's* debts, securing his creditors payment in full; and down to that time the pecuniary interest of the creditors was involved in the refusal of the certificate. If that decree had been submitted to, and the opposition continued, I should have had to consider whether, as a matter of justice to the public, the assignees were warranted in opposing the certificate at *Kingsland's* expense, and whether their conduct was vindictive or designed to make costs; but *Kingsland* obtained leave to appeal from the decree, and the rest of the costs were incurred before 27th September, when that leave lapsed, so I think they come under the ordinary principle, and should be allowed to the assignees.

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The next objection is, that various sums have been allowed as solicitors' costs for doing what should be considered assignee's duty. Some of the items in *Martin's* costs would, if he had been assignee, have been, I think, open to this objection. I have dealt with that bill on a more general ground, and I have had no instances shewn in other bills.

The next objection raised by the rule *nisi*, involving also a distinct application, is the amount of compensation allowed to the assignees; five per cent. has been allowed to the official, and two and a-half per cent. to the trade assignee; and that upon all assets realised, including those applied in payment of debts proved, and £1,200 on mortgage. The assignees had a great deal of trouble caused by *Kingsland's* various devices for concealing property, a fictitious action, and sale in execution by his son, &c., and they incurred a great deal of risk in legal proceedings, and in instituting and successfully prosecuting the suit of *Goodman v. Boulton*. There are points on the other hand on which I am not satisfied as to their conduct; but on the whole I am not disposed to reduce the allow-

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ances, and discharge the application to reduce them with costs, so far as costs were occasioned by it separately.

As to some items of expenses for watching *Kingsland's* goods, I think his conduct, to which I have adverted, caused suspicion, and there were some signs of goods being removed, which, I think, warranted the precaution. The furniture in a bill of sale to Mr. *Warburton* was property in which the creditors might be interested at the time of the watching, and therefore I think that the assignees should be allowed it.

The omitting to notice that furniture itself, has been made a subject of objection. It stands on a peculiar footing. *Warburton* had a bill of sale over it, and instead of valuing and proving for the balance according to the Act, he arranged with *Goodman* to have it sold by auction, when it brought less than the debt. In consequence, the learned Commissioner, and on successive appeals, I and the full Court, rejected *Warburton's* proof for the balance, and, *Kingsland* has had the advantage of paying his debt with furniture of less value. I can hardly say how either the debt or the furniture could properly appear in the plan, and I think there is no irregularity—at all events, no injustice—in the omission.

The next objection is for a case about *Warburton's* claim, as to which *Goodman* and *Warburton* agreed, in order to settle a difference, to abide by counsel's opinion, to be paid for by the party against whom it should be given, which was I think judicious, and for which *Goodman* should be indemnified.

The last objection relates to shares in a mining company, embracing those which formed the ground of dispute with *Merfield*, now represented in the plan as of no value, *Kings-*

land, somewhat inconsistently with his case against *Merfield*, insists that these shares were valuable, and at one time might have brought a pound apiece, and that the assignee should be charged with that amount; the fact being that at one time a pound apiece was offered for them, and *Goodman* was disposed to accept it, but consulted *Kingsland* (a very proper adviser, as I think, especially as he was then inclined to break the settlement), who objected to the price, and *Martin* concurring, the offer was not accepted until the shares declined in value, when the offer was withdrawn. It would be absurd to hold assignees responsible for not exercising the best possible discretion, as to selling shares subject to fluctuation.

On the subject of costs, *Kingsland* is wrong on far the greater number of points, and those involving the large amounts; but he has succeeded on some upon which I think it material that petitioning creditors and assignees should be corrected. On the whole, as between him and the assignees, I shall leave both to abide their own costs heretofore upon the rule *nisi*. I shall make an interlocutory order on the rule *nisi* to refer it to the Commissioner to retax the costs of *Martin* as petitioning creditor in the presence of the solicitor of *Kingsland* unless the parties consent to their being at once taken £72 5s. 7d., the taxed costs down to making the rule of sequestration absolute. I shall defer my order on other points formally until that is done. There is, I believe, a separate application to expunge or vary *Merfield's* profits. That I shall discharge with costs. There is also, I believe, a separate application to vary the allowance to the assignees. That I shall discharge with costs, so far as applicable to it separately.

1869.

Oct. 7, 28.

An estate may be released from sequestration under sec. 42 of the "Insolvency Statute," although, the assets being under £100, only one meeting has been held.

IN RE BENJAMIN LEETE, AN INSOLVENT.

MOTION for release of an estate from sequestration, under section 42 of the "*Insolvency Statute*," an offer of composition having been accepted. The assets being under £100, only one meeting had been held.

Mr. *Lawes* in support of the motion.—Though the section provides for the offer of composition being made at the third meeting, yet where no third meeting can be held, it is submitted that the offer may be made at the first and only meeting.

Cur. adv. vult.

October 28.

MR. JUSTICE MOLESWORTH now made the order as sought.

Oct. 14, 27, 28.

A proof cannot be met, by way of set off, by receipt of payment of another debt by way of fraudulent preference.

IN RE DANIEL B. GROVES, AN INSOLVENT.

APPEAL from the decision of the Chief Commissioner rejecting a proof of debt for £600 by the mother of the Insolvent.

Dr. *Mackay* and Mr. *Holroyd* for the Appellant.

Mr. *Lawes* for the Official Assignee.

The case was argued 14th October, before Mr. Justice *Molesworth*, who required additional evidence, which was taken before him. The case involved the consideration of the circumstances under which a succession of advances

and repayments had taken place between the Insolvent and his mother, and of other family arrangements.

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MR. JUSTICE MOLESWORTH concurred in the Commissioner's view, upon the evidence before him, but upon the additional evidence admitted the proof. A debt of £300 was paid by the Insolvent to the claimant in December and January, prior to his insolvency in February, 1869. It was argued in opposition to the admission of the proof to the extent of £300, that this payment was a fraudulent preference, and as to this, the judgment was as follows—"It has been urged that the payment of the £300 was a fraudulent preference. According to the decision in *Sheldrick v. Aitken* (s), I think it was not. At all events, I think a proof cannot be met, by way of set off, by the receipt of payment of another debt by way of fraudulent preference."

(s) *Ante*, L., p. 59.

1869.

February 18.

Where a caveat is lodged without any undertaking to appear being filed as required by Supreme Court Rules, cap. viii., sec. 8, the Court will grant administration notwithstanding such caveat.

IN THE GOODS OF WILLIAM KENT O'KEEFE,
DECEASED.

WILLIAM KENT O'KEEFE died 4th January, 1868, having made a will leaving all his property to his widow, and appointing her sole executrix. The executrix, resident in Tasmania, proved the will there. A brother of the deceased in Victoria, failing to induce the executrix to prove the will in Victoria, gave notice of an application for administration to himself as next of kin. A caveat was lodged in the matter, as on behalf of the executrix, by solicitors in Melbourne, instructed by solicitors in Hobart Town, purporting to act on behalf of the executrix. The letter of instructions from the solicitors in Hobart Town to the solicitors in Melbourne was filed with the caveat; but no undertaking to appear by the executrix herself, or by the solicitors lodging the caveat, was filed as required by the Supreme Court Rules, cap. viii., sec. 8. The brother claimed to be interested beneficially as a creditor of the deceased. The property in Victoria consisted of debts due to the testator to the amount of about £200.

Mr. *T. a'Beckett* applied, upon affidavits setting out the above facts, for administration with exemplification of the will annexed, to the brother as next of kin, and submitted that as the caveat had not been lodged in the manner required by Rule 8 it might be disregarded.

MR. JUSTICE MOLESWORTH granted the application.

IN THE WILL AND CODICILS OF GEORGE WISE,
DECEASED.

1869.

May 20.

THE testator, by a document dated 11th June, 1858, and declared to be a codicil to his last will, after reciting that he had by his will of 13th August, 1856, deposited in Scotland, disposed of certain property in Ayr in favour of his wife by giving her an interest terminating on her second marriage, and that he was anxious to alter that disposition, devised the property in Ayr to his wife for life absolutely, and after her death to his sister. The document then recited that since the making of the will he had come to Victoria and acquired property there, and devised and bequeathed the whole of his property in Victoria to his wife, and appointed her executrix by the words "executrix of this my will." By a document dated 8th February, 1869, declared to be a second codicil, an executor was appointed to act with the executrix, a legacy was bequeathed, and the testator in all other respects confirmed his former codicil.

Two documents purporting to be codicils to a will deposited in Scotland dealing with land there, the codicils dealing with the whole of the testator's real and personal estate in Victoria, admitted to probate as codicils without the will being proved.

Mr. Cock moved for probate of the codicils without the will, which was in Scotland, and of which no copy could be obtained. The will is in effect, though not in words, revoked. The first codicil is spoken of by the testator as his will. In any event, the codicils effectually dispose of all the property in Victoria, and may therefore be admitted to probate here without the will, which does not affect property in Victoria.

MR. JUSTICE MOLESWORTH.—I will grant probate of the two codicils, as codicils.

1869.

July 8.

Rule to administer freehold land granted to the husband of the sister of the intestate; the intestate's brother and heir-at-law declining to apply for a rule.

IN THE REAL ESTATE OF WILLIAM B. BALDWIN,
DECEASED, INTESTATE.

MR. *WEBB* moved for a rule to administer the freehold lands of *W. B. Baldwin*, deceased, to be granted to the husband of a sister of the deceased. There was a brother of the intestate resident in the Colony, but he declined to apply for a rule, as it would practically disinherit him; and if no rule were taken out he would be entitled to all the property as heir-at-law. He submitted that the present applicant was entitled to administration in right of his wife: *Williams on Executors*, 903.

HIS HONOR granted the application, observing that it was more desirable to have a man than a married woman to administer the property.

June 17.

July 12.

Where the relatives of an intestate were unknown, but he was believed to have been a native of London, advertisements of intended application for administration by the donee of a *donatio mortis causa* ordered to be inserted in the London *Times*.

IN THE GOODS OF DANIEL HOLTON, DECEASED,
INTESTATE.

MR. *J. W. STEHEN* applied for administration on behalf of the donee of a *donatio mortis causa*, and referred to *In the Goods of Tully* (t). The property consisted of bank deposit receipts to the amount of £403. The relatives of the deceased were unknown, but he was believed to have been a native of London.

Our. adv. vult.

MR. JUSTICE MOLESWORTH made an Order as follows:—

Order that the consideration of the application be postponed until the applicant shall have caused an advertisement to be inserted in *The Times* newspaper, published in London, twice at the interval of a fortnight (in a form prescribed by the order, stating the intention of the Court to grant administration to the donee unless some person better entitled applied for administration). Liberty to renew the application four months after the last insertion of the advertisement.

(t) *Ante*, Vol. IV. I.E.M.

CAWLEY v. CAWLEY.

1869.

September 1.
December 23.

THIS suit was instituted by *Mary Cawley* for the grant of letters of administration to her as widow of *John Cawley*, deceased. The Defendant, *Henry Cawley*, father of the deceased, denied her right to administration.

Gross misconduct of a wife, as such, will disentitle her to administration of her husband's estate after his death; but ante-nuptial want of chastity will not so disentitle her.

The Plaintiff was married in 1851, in England, to one *John Thumber*. She had previously lived with a person named *Manzorani*, by whom she had a child still living. In 1852 she and *Thumber* came out to this colony in the same ship with *Cawley*. In 1853 she left her husband and lived with *Cawley*, *Thumber* returning to England a short time afterwards, and she continued to live with *Cawley* as his wife until his death. In May, 1859, *Cawley* met with an accident, and was taken to the Ballarat Hospital. He there made a will leaving all his property to the Plaintiff, and to a child he had by her. She had hitherto been known as Mrs. *Cawley* though not married to *Cawley*; but a short time before the deceased's death, the ceremony of marriage was performed between him and her by the Rev. *John Potter*, Church of England minister at Ballarat. This marriage revoked the will which he had made a few hours previously, and thus the deceased died intestate, assuming the marriage to be valid. The Defendant lodged a caveat to Mrs. *Cawley's* application for administration, and by his answer denied the validity of the marriage between the deceased and the Plaintiff, and alleged that *Thumber*, her first husband, was heard of in England in 1867. Evidence was given of the Plaintiff's marriage to the deceased shortly before his death, and the Plaintiff swore that she had not heard of, or from, her former husband for more than seven years prior to such marriage. The above facts as to her previous history were elicited on her cross-examination. No evidence was given on behalf of the Defendant.

Where costs of an Ecclesiastical suit were not paid pursuant to the decree, order absolute in the first instance for attachment granted.

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 TICAL.
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Mr. *Webb* for the Plaintiff. — The application for administration is opposed on the ground that the Plaintiff is not the widow of the deceased, it being alleged that her former husband was alive at the date of its celebration, but no evidence is given of that. Where a husband has not been heard of for seven years, the presumption of law is that he is dead: *Rust v. Baker* (v). The onus of proving that he is alive rests with the Defendant; and the Court will not assume that the Plaintiff has committed bigamy: *Rex v. Twining* (w).

Mr. *Lawes* for the Defendant. — I do not dispute the marriage, but submit that the Court in the exercise of its discretion will not grant administration to a widow, where she has, as in this case, been leading an immoral life: *Fleming v. Pelham* (x), *Conyers v. Kitson* (y), *In re Anderson* (z). [*Molesworth, J.* — All those cases are instances in which administration was refused to a widow who had misconducted herself as a wife of the intestate. Is there a case where want of chastity in the abstract has been held to prevent a woman getting administration?] I cannot find any case to that effect.

No reply was called for.

Decree for Plaintiff, with costs.

December 23.

The costs not having been paid, Mr. *Webb*, on this day on motion *ex parte*, obtained an order absolute in the first instance for an attachment for non-payment of them.

(v) 8 Sim., 443.
 (w) 2 B. & Ald., 386.
 (x) 3 Hagg., 217.

(y) 3 Hagg., 556.
 (z) 33 L. J., Prob., 149.

IN THE WILL OF HENRY DYER, DECEASED.

1869.

September 2.

THE testator devised all his real estate to trustees, and disposed of the beneficial interest by reference to schedules as follows:—"As to the lands in the first schedule to this my will for the benefit of &c." The will was attested in the ordinary form, the schedules followed the attestation clause, and each sheet was signed at foot by the testator, the attesting witnesses subscribing their initials only. There was no reference to the schedules in the attestation clause. It appeared by the affidavit of one of the attesting witnesses that the will and schedules were in the same state as when executed, that the signature of the will and schedules was all one transaction, and that all the formalities in regard to execution had been observed, subject to the initials of the witnesses being sufficient signatures to the schedules.

The initials of attesting witnesses to a will, are sufficient signatures when affixed for the purpose of attestation.

Mr. *T. a'Beckett* moved for probate of the will with the schedules, and as to the signature by initials, referred to *In re Christian* (a), *In re Martin* (b), and *In re Hinds* (c).

MR. JUSTICE MOLESWORTH admitted the schedules to probate.

(a) 2 Rob., 110.
(b) 6 N. C., 694.

(c) 16 Jur., 1117.

1869.

Oct. 21, 28.

A testator signed his will in the presence of one attesting witness. Some weeks after, the testator, with that attesting witness, attended at the house of another person, and informed him that the will which he then produced, had been signed by him and the first witness; and at the testator's request, this person signed his name as a second attesting witness in the presence of the testator and the previous attesting witness.

Held, that there was no attestation to satisfy the Statute; and administration granted as upon intestacy.

IN THE GOODS OF JAMES LACEY, DECEASED,
INTESTATE.

THE deceased had left a will signed by him and by two witnesses. One of the witnesses made an affidavit as follows:—"About the 23rd day of September, 1868, I met the said *James Lacey* at his place of residence by special appointment, and he then desired me to be a witness to the execution by him of his last will, and I consented. The said *James Lacey* thereupon wrote and signed the paper writing produced, in my presence (his wife being the only other person then present). I wrote my name at the request and in the presence and sight of the said *James Lacey* as a witness to his will. The signature of *George Houghton*, which is written underneath my signature at the foot of the will, was not written by him at the time I wrote my name thereto; but some weeks afterwards, at the request of the said *James Lacey*, I accompanied him to the residence of the said *George Houghton*, and the said *James Lacey* then, in my presence, explained to the said *George Houghton* that the paper which he then shewed him was his last will, and told him that I had signed the will as a witness to his due execution, and also told him that he now wished him to sign the said will as witness. The said *George Houghton* thereupon, in my presence and at the request and in the presence of the said *James Lacey*, signed his name as a witness to the said will." *George Houghton* made an affidavit giving a similar account of the circumstances under which he signed as a witness.

Mr. *Cock* moved for administration to the widow as on an intestacy, submitting that there had been no sufficient attestation of testator's signature to satisfy the statute, citing *Hindmarsh v. Charlton* (d).

Cur. adv. vult.

ness and cunning he went to Mrs. C.'s brother, *Allardyce*, inducing Mr. C. to leave him on the road, so that *Allardyce* might not be informed of his real name. He introduced himself to *Allardyce* and the Petitioner as *James Gordon*, son of *Samuel Gordon*, of Crathie, and although they were personally unacquainted with him, yet they knew his family to be a respectable one in their own country. Then, with equal cleverness, he succeeded in inducing the Petitioner to accept his proposal to become his wife; and the ceremony was about to be performed when a letter was brought to her, informing her of the real facts. He seems to have been conscious of its contents, for he contrived to intercept it, and destroyed it before the Petitioner had an opportunity of reading it; and the marriage took place, certainly with some haste—for scarcely a week elapsed between the Respondent seeing her and the ceremony.

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But as put for the Petitioner, not unnaturally, the contract of marriage was by each agreed upon more hastily on account of the knowledge of the other's family. The two families were acquainted, and although these particular persons had not seen each other, the circumstances must be looked upon differently than if they had been utter strangers to each other. It afterwards turned out that the Respondent's real name is *Mitchell*. This fact is proved by a number of witnesses, leaving no doubt that for some object, whatever it may have been at first, as afterwards he seems to have acquired an affection for, and was very reluctant to give up, the Petitioner, he very skilfully plotted and carried out the pretence that he was *James Gordon*.

Marriage is a contract, and to constitute a contract, both parties must know what they are entering into—no mistake of identity must exist. Here, it is not merely a mistake of name, it is actually a mistake of identity. The Petitioner contracts with *James Gordon*, thinks she marries *James*

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to her in Victoria as *James Gordon*. Other members of the Petitioner's family in Victoria knew the true *James Gordon* and were not deceived; but *Mitchell*, by representing himself to be *Gordon*, succeeded in deceiving the Petitioner, and married her under his assumed name of *James Gordon*, before her family were able to inform her of the imposition. Her evidence was as follows:—

"I came to this Colony in September, 1866, from Lockel, Aberdeenshire, Scotland, where my parents resided. Had six sisters and two brothers. One brother is dead. Three sisters reside in the colony—Mrs. C., Mrs. S., and Mrs. F. My brother, who lives at Mount Prospect, is also married. He left Scotland thirteen years ago. My father was a farmer. Knew the family of *Mitchells*, who resided two miles from my father's place. There were five sisters and a lad, who had left the place before I knew the family, and had come to Australia. The elder *Mitchell* was a game-keeper. The *Gordons* lived in Crathie, near Balmoral, about forty miles from Lockel. I was residing with some friends named *Kiddes*, about eighteen miles from the *Gordons*, and the two young *Gordons* were pointed out to me as young men about to come to Australia. I had about eleven years ago lived with my aunt, in a place in Moray, some 100 miles from Lockel. I lived after I came to the colony with Mrs. S., afterwards with my brother, and then with my other sisters, a few months with each. In April, 1868, I was living with my brother. The Respondent came to the house between nine and ten in the evening of Friday, 10th April. He introduced himself as *James Gordon*, son of *Samuel Gordon* of Crathie; and that he had come on a friendly visit, and wished to stop the night; that Mrs. S. had sent him to bring me to Melbourne. Mrs. S. had previously sent for me, but I could not go, as I was unable to get to Ballarat next day. My brother and the Respondent brought me to Ballarat. My brother returned to his farm, and the Respondent came with me to Melbourne. I saw him again on Sunday and Monday. On Monday he proposed marriage, but I would not consent. On Tuesday, he renewed his offers, and, unfortunately, I consented. I was induced to consent by his stating he was *James Gordon*, and belonged to the family of the *Gordons*, whom I knew to be respectable. If I had known nothing of the family I should not have consented. He told me he was overseer on the Gunnewarra Station, on the Murray. I wrote to my brother asking him to be present at the marriage on Thursday, as Mr. *Gordon* had to leave for his station on Saturday. On Thursday afternoon I received a letter at Mr. S's. Mrs. S. and *Gordon* were in the room with me. I opened the letter, and he seized hold of it, requesting me to bring him something. I thought it was merely about my brother's inability to attend, and I left the room. On my return to the room I found him tearing the letter. I asked him why he did it. He said it was of no consequence, as it was merely an apology

from my brother for not coming. We were married that evening, and we lived at Mr. S's till the Sunday, when *Gordon* left for his station. Afterwards got the letter of Mrs. C. of 23rd May. Till I got it I had no idea that my husband was not *James Gordon*. I then sent letters to him. I got a letter from him in reply. He came to Melbourne from the station on the 10th May. I saw him at Scott's Hotel; he was ill in bed. I said nothing to him as he was too ill. I saw him again two days afterwards (Monday). He was then better, and I then shewed him Mrs. C's and Mrs. F's letters. He told me his mother's name was *Margaret McGregor*, and denied that he was *Mitchell*: asserted that he was *Gordon*; that he knew *Mitchell* in South Australia, and he would go to South Australia, and bring him. I told him the sooner he went the better, as I was very uncomfortable about it, and would not see him again till he proved it. He said I was unreasonable, and wished it done in a day. I said I would give him six weeks to prove his statements. Next day I got a letter from him, asking me to meet him. I met him on the road, and he repeated that his statement was true. I said he must prove it. He left for the station next morning, and I never saw him again. On 20th May received a letter from him, and also one on 24th May. Never heard of or from him since. In the last letter he sent me he stated that I was not to write again till I heard from him."

Other evidence fully established the fact that the Respondent representing himself as *James Gordon* was in fact *James Mitchell*.

Mr. *Higinbotham* for the Petitioner. The ground on which the declaration of nullity of marriage is sought, is a mistake as to the identity of the person with whom the marriage contract has been entered into. I admit that no mistake or misrepresentation as to the circumstances or status of the husband would be sufficient for such a declaration, and that it cannot be made unless the deception is clearly proved, so that it appears that the Petitioner intended to marry *Gordon* when she married *Mitchell*: *Midgeley v. Wood* (g), *Bethell v. McMahon* (h), *Ewing v. Wheatley* (j), *Wyatt v. Henry* (k), *Swift v. Kelly* (l), *Rex v. Burton-on-Trent* (m), *Lane v. Goodwin* (n), *Macqueen*, 314, and *Sanchez*, 69. The case will

- (g) 30 L. J., Prob. 57.
- (h) *Ib.*, 61.
- (j) 2 Hagg., 175.
- (k) *Ib.*, 215.

- (l) 3 Knapp., 247.
- (m) 3 M. & S., 537.
- (n) 4 Q. B., 361.

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admit this test. If the Petitioner had known that the Respondent was *Mitchell* and not *Gordon*, would she have married him? If she would not, she is entitled to relief. It cannot be disguised that the Petitioner has acted hastily; but her conduct may be accounted for and excused, by the very deception that was practised upon her. She was residing with her friends; was in no way dependent upon the person who proposed to her; she was not subject to the temptation which a dependent person would have felt; nor was she of great inexperience or extreme youth, to make her unduly incautious. Her friends gave their consent to the marriage, and it was only by a series of most unfortunate coincidences that the knowledge of the true position of *Mitchell* was kept back from her till too late.

No appearance for the Respondent.

THE CHIEF JUSTICE:—

The facts of this case are very singular. The Respondent was acquainted with the family of the Petitioner in Scotland. He came out here, and was convicted of some crime, and underwent the punishment. He appears to have been anxious to retrieve his position, and after he had expiated the offence he committed, he followed an industrious course of life, quite opposed to that he previously pursued. Though acquainted with the Petitioner's family, he never had seen her; he seems, however, to have thought that if he could contract a marriage into this family—a respectable family, and well connected here—it would contribute very much indeed to better his position. He went to her sister's (Mrs. *O's*) house before he had even seen the Petitioner. It was, therefore, in the first instance, not from affection, but from the motive suggested. He there feigned the name of *Gordon*, pretending that he was *Gordon*, but his pretence was at once detected by Mrs. *C.* and her husband. With a vast deal of skilful-

ness and cunning he went to Mrs. C.'s brother, *Allardyce*, inducing Mr. C. to leave him on the road, so that *Allardyce* might not be informed of his real name. He introduced himself to *Allardyce* and the Petitioner as *James Gordon*, son of *Samuel Gordon*, of Crathie, and although they were personally unacquainted with him, yet they knew his family to be a respectable one in their own country. Then, with equal cleverness, he succeeded in inducing the Petitioner to accept his proposal to become his wife; and the ceremony was about to be performed when a letter was brought to her, informing her of the real facts. He seems to have been conscious of its contents, for he contrived to intercept it, and destroyed it before the Petitioner had an opportunity of reading it; and the marriage took place, certainly with some haste—for scarcely a week elapsed between the Respondent seeing her and the ceremony.

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But as put for the Petitioner, not unnaturally, the contract of marriage was by each agreed upon more hastily on account of the knowledge of the other's family. The two families were acquainted, and although these particular persons had not seen each other, the circumstances must be looked upon differently than if they had been utter strangers to each other. It afterwards turned out that the Respondent's real name is *Mitchell*. This fact is proved by a number of witnesses, leaving no doubt that for some object, whatever it may have been at first, as afterwards he seems to have acquired an affection for, and was very reluctant to give up, the Petitioner, he very skilfully plotted and carried out the pretence that he was *James Gordon*.

Marriage is a contract, and to constitute a contract, both parties must know what they are entering into—no mistake of identity must exist. Here, it is not merely a mistake of name, it is actually a mistake of identity. The Petitioner contracts with *James Gordon*, thinks she marries *James*

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Gordon, and would only have married *James Gordon*, whereas in truth, and in fact, the ceremony of marriage was performed between her and *James Mitchell*. There was no contract; the parties were not *ad idem*; there was no *consensus*, the two minds were not at the same point. *James Mitchell* married *Sarah Allardyce*, but *Sarah Allardyce* never intended to marry *James Mitchell*; she intended to marry *James Gordon*. I do not think that the haste with which the marriage was contracted will render that valid which was invalid *ab initio*. The reason for the apparent expedition is a substantial one, and recommends itself. He was overseer of a station at a considerable distance in the country. He had come suddenly into Melbourne, and was obliged to leave it on a fixed day, and the marriage could not be postponed but at great inconvenience. The fraud, I think, has been unquestionably and distinctly proved. It is a case in which distinct proof is necessary, not merely of a misapprehension about the name, but that there was an actual mistake of the identity of one of the parties. I think that has been proved, and the Petitioner is therefore entitled to the relief she asks.

PARKE v. PARKE.

PETITION by a wife for dissolution of marriage on the ground of bigamy and cruelty.

Mr. *Billing* and Mr. *Molesworth* for the Petitioner.

No appearance for the Respondent.

The petition and citation had been served (without any order for service out of the jurisdiction) on the Respondent in New South Wales, where he was a prisoner serving his sentence for bigamy.

As to the sufficiency of this service the Court were referred to *Pasmore v. Pasmore* (o).

Cur. adv. vult.

THE CHIEF JUSTICE:—

The Petitioner and Respondent were married in Melbourne. After the marriage they lived for some time in New South Wales, and subsequently returned to Melbourne. The Respondent, who is by profession a sailor, left Melbourne, telling his wife, who remained behind, that he would return. He went as steward of a ship to London, and then to New South Wales, where he married a second time, his first wife (the present Petitioner) being still alive. He was convicted of bigamy, and sentenced to imprisonment. He was served in New South Wales with a copy of the petition and citation, and the question we have now to determine is, whether, under the Act, this service is sufficient; whether, in fact, the general

(o) 1 W. & W., I.E.M., 56.

1869.

September 17.
October 4.

No special order is required for personal service of the petition and citation, on the Respondent out of the jurisdiction.

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rules and orders of the Court allow such service without a special order. The general rule framed in this colony is on this point substantially a transcript of that in force in England; it requires personal service of the petition and citation. That personal service was effected in this case, although the Respondent was out of the jurisdiction of the Court. No special order is necessary in the English Courts, and we think none is necessary here. Although special orders have sometimes been applied for, that is because the service must be effected and the return filed within a certain time under the general orders; and in most cases it is impossible to do so within that time. The difficulty in such cases is not so much service as domicile. The service does not confer jurisdiction on the Court. The old practice in the Ecclesiastical Courts was by ways and means, and putting the person affected with notices not appearing, in contempt. That practice has never been necessary in this Court, and it is not now necessary in England; but a certain mode of service is prescribed, which mode we have adopted here. Although the Respondent left the Colony, he left it with the intention to return; he so informed his wife, and he left in an employment in which his return might be supposed. We think service was sufficient, the Court had jurisdiction, and the Petitioner is entitled to a decree.

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Court of the Chief Judge

OF

COURTS OF MINES,

BEFORE

HIS HONOR ROBERT MOLESWORTH, Esq.,

CHIEF JUDGE.

BRENNAN AND OTHERS v. WATSON AND OTHERS.

1869.

Feb. 24, 25.

APPEAL from an order of Mr. *Skinner*, made on the 8th day of December, 1868, he being then Judge of the Court of Mines for the Mining District of Sandhurst. The case was stated by Mr. *Skinner* after his removal from that district, and concluded as follows:—

"The parties, their attorneys, &c., being unable to agree, and the time for transmitting the case on appeal, according to the 172nd section of the '*Mining Statute*,' 29 Vic., 291, being about to expire, the Appellants' attorney applied to me for an order for extension of time, and also required me to settle the case after the time of my removal from the said office of Judge of the Court of Mines for the Mining District of Sandhurst to the office of Judge of the Court of Mines for the Mining District of Castlemaine, on the ground that said section 172 required the case to be settled by the Judge from the order of whom such appeal shall be brought, and the time to be extended by 'such Judge.' I signed the said order for extension of time, and have settled this case at the request of the said defendant's attorney accordingly.

"C. BRUCE SKINNER,
"Judge of the Court of Mines for the
"Mining District of Castlemaine."

The Judge of the Court for the time being, is the proper person to state a case under the Act No. 291, sec. 172, although he may not be the Judge who made the order appealed from.

Where, on the face of an appeal case, it appeared that the appeal was not in time, and the case did not shew any order to enlarge the time, the Court refused to hear the appeal, without requiring

a special application to set aside its setting down.

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Mr. *Macoboy*, the successor of Mr. *Skinner*, as Judge of the Court of Mines for the Mining District of Sandhurst, added to the case a note as follows:—

Statement.

"The Appellants, apparently not knowing which Judge should state the case, and endeavouring to be on the safe side, by having the signatures of both; the parties to this appeal having disagreed as to the form of the special case, and being unable to agree upon the same, and having requested me as present Judge of the said Court to settle a proper form thereof; I have, so far as in me lies any authority to do so, settled this form accordingly. Given under my hand and the seal of the said Court.

"M. F. MACOBOY,
 "Judge of the Court of Mines for the
 "Mining District of Sandhurst."

Argument.

Mr. *Martley* and Mr. *Helm* for the Respondents, took a preliminary objection, that as Mr. *Skinner*, the judge who made the order, was removed from the district before he had stated the case for appeal, the appeal necessarily lapsed. Section 172 of the "*Mining Statute*" requires the case to be stated by "the Judge from the order of whom the appeal is brought." The jurisdiction of the judges of the Courts of Mines is strictly local, and on Mr. *Skinner's* removal he could not state a case in the court from which he was removed. The Legislature has omitted to provide for the case of death or removal of the Judge, and the defect can only be remedied by statute. If Mr. *Macoboy* was, as Judge of the court, the proper person to settle the case, he, and not Mr. *Skinner*, would have been the proper person to extend the time for transmitting the case. Mr. *Skinner's* order is the only order set out, and the case would therefore appear to be transmitted too late.

Mr. *J. W. Stephen* for the Appellant. I rely upon the certificate of Mr. *Macoboy*. As judge of the court in which the order was made, he had power under section 172, to state a case on appeal from it, and he might, if necessary, have obtained the assistance of Mr. *Skinner* in doing

so under section 85. *Lewis v. Pearson* (a) decides that an appeal must be taken to be properly transmitted, unless by the case it conclusively appears to have been improperly transmitted. It is consistent with the facts set out in this case, that an order extending the time was made by Mr. *Macoboy*, and if no such order was made, an application to strike the appeal out of the list would have been the proper way to take advantage of the omission.

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Argument.

Mr. *Martley* in reply.

The following cases were referred to in argument: *Lewis v. Pearson* (a), *Inskip v. Inskip* (b), *Stirling v. Hamilton* (c), *Williams v. Row* (d).

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

February 25.

Judgment.

In this case an appeal had been lodged against an order of Mr. *Skinner* as judge of the Court of Mines at Sandhurst. Before the case was either agreed to by the parties or settled by him, he was removed to another district, and Mr. *Macoboy* was appointed in his stead. The parties being embarrassed in this way, as to the manner of proceeding with their appeal, and some doubt arising whether the appeal could be prosecuted at all, got an extension order from Mr. *Skinner* after his removal, which is the only order upon which the case is now before me.

The first question is, what is the result of the removal of a judge, upon an appeal then pending before him? The same difficulty might occur in the case of a judge's death; and I should be very slow to adopt a construction of the Act, by which a party who had lodged his appeal,

(a) *Ante*, Vol. IV., M., 23.

(b) *Ante*, Vol. III., L., 24.

(c) *Ante*, Vol. I., L., 14.

(d) 1 W. & W., L., 376.

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 ———
Judgment.

would be thus deprived of the benefit of it. I think that the language of the Act requires no straining in order to say that the case is provided for, and that the appeal does not fail. The description in the 172nd section, of the order which may be appealed from, is, "Any decree or order of the said Court, or any order of a judge thereof, not being an order of commitment." And then it provides that "every such appeal shall be decided by the said Chief Judge on the facts as agreed on between the said parties, or their attorneys, or counsel, or stated by the judge from the order of whom, or by the judge of the Court from the decree or order of which such appeal shall be brought." I do not think that these subsequent words can be taken to have reference to the distinction in the prior part of the section between the order of the Court and the order of a judge because they are transposed. The "judge of the Court" is, I think, the judge for the time being upon whom, I think, all the duties created by this clause devolve. In the case of the removal of a judge, if the succeeding judge felt a difficulty as to learning the facts to which he was to certify, resort might be had to the 85th clause, by which he would virtually have the assistance of the judge to whom he succeeded. In the case of the death of the judge there might be greater difficulty, but then the chief judge would have the power, under the 173rd section, to examine witnesses himself. I therefore think, that the proper person to have acted in this case was Mr. *Macoboy*, the succeeding judge.

Then the Appellant is thrown upon this difficulty, that his case shews that it was not forwarded within four weeks, and the only enlargement of time which appears upon the case is that of Mr. *Skinner*, attempted to be effected after he was out of office. Therefore, on the face of this case the appeal is not in time. It has been argued that as I find the appeal here I ought to dispose of it, and put the party who objects to the manner in which

it is here to make a special application to set aside its setting down. Now the transmission of the appeal case is the act of the Appellant, and not of the Respondent; and it appears on the face of the case, that the appeal was not in time, and there is no valid order to enlarge it. I have been referred to the case of *Lewis v. Pearson*, which differs from the present case in this most material point. In that case the judge had certified that there was an enlargement, and the person objecting wanted to falsify that. The present case does not shew an enlargement: I therefore make no order on the present appeal, it appearing not to have been brought in proper time. I say nothing as to costs.

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Judgment.

There is so much doubt as to how an appeal is to be prosecuted after the death or removal of a judge, that I would call the attention of those having the framing of legislative enactments to the desirability of providing for the case.

COLLINS v. HAYES AND OTHERS.

February 24.
March 2.

APPEAL from the Court of Mines at Maryborough. A suit was instituted by *Collins* and eight others, against *Hayes* and others, to recover ground as in the illegal occupation of the Defendants. The Plaintiffs alleged no other title in themselves than their miners' rights, and com-

A suit was instituted by nine plaintiffs against defendants, alleged to be in illegal occupation. The plaintiffs had

no title but their miners' rights. It appeared in evidence that the plaintiffs' solicitor had paid the expenses of the suit, and was to have half of each of the plaintiff's interest in the land when recovered. The Judge of the District Court of Mines dismissed the suit, with costs, as tainted with champerty and maintenance. On appeal,

Held, that the claim was in its inception and concoction, based upon champerty and maintenance, and appeal dismissed, with costs.

It is not necessary to constitute champerty, that there should be a binding contract between the parties, which, apart from its illegality, would be valid.

Seem, that when a plaintiff has originally a good title, he is not to be defeated on the ground of the mode of remunerating the attorney whom he employs.

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 —
 Statement.

plained that the Defendants had not taken up the ground in conformity with the by-laws, and sought to be put into possession. The case came on to be heard before the Judge of the Court of Mines, 11th November, 1868. Mr. *Phelps* conducted the case as the solicitor of the Plaintiffs. The material portions of the case stated by the learned judge who dismissed the plaint were as follows:—

“None of the several Plaintiffs on behalf of whom miners’ rights were handed in by Mr. *Phelps*, except *Thomas Wardell*, appeared personally in court, though Mr. *Phelps* was challenged by the Defendants to produce them. On the cross-examination of one of the witnesses produced on behalf of the Plaintiffs, it was brought out that *Samuel Lee*, one of the ostensible Plaintiffs, had denied to him any knowledge of his (*Lee*) being a party to the litigation, but he (*Lee*) did not come into court personally to disclaim. *Thomas Wardell*, the particular Plaintiff alluded to, was examined by the Plaintiffs’ solicitor as one of the persons who, it was alleged, should substantiate the main allegation, viz., that the ground in dispute was not abandoned or unoccupied ground within the meaning of the by-law in September, 1864, when the extended claim was taken up. On his cross-examination he made the following statements and disclosures, which I believed:—‘I am one of the Plaintiffs. I am a miner, now living at Dunolly. Mr. *Phelps* is my attorney. I have not supplied him with any funds. *Phelps* is to receive half a share; if there were twenty, he would receive half of each share. There are nine jumpers; I am one of the nine. *Phelps* is to receive half of my share. *Phelps* has arranged with the others for himself. I know Mr. *M’Leish*, one of the Defendants. I admit I did ask him for money. I asked him first for work. He said he had none. It would have been a gift and not a loan, if I had received it. I had been acquainted with him. I was in this case when it was launched. I was in New South Wales. I heard of it at Deniliquin. I was told a letter lay there for me. *Phelps* was to have half my share, and bear the costs. I have worked eight weeks for *Phelps* as a day labourer. I authorised *Phelps*’ clerk to get my miner’s right. I gave him no money.’ Mr. *Phelps* gave the following evidence:—‘I paid for all these miners’ rights which I now produce; they belong to the nine Plaintiffs respectively. I was instructed by these several parties to use these miners’ rights, and took them up in their names.’ Cross-examined—‘It is true that I am getting a share with the others. I expect to get a share from every man; that is a portion of the fee. I may have said, I would not let the Defendants alone. I will spend every farthing I am worth to get a share in that claim. I’ll jump that claim.’ From the foregoing evidence it appeared that the suit was substantially the suit of the solicitor, Mr. *Phelps*; that he had made an illegal bargain with the Plaintiffs, or with several of them, to carry on the suit at his own expense, or in consideration of his getting, as a part of the fee, one-half of each man’s share if

successful. I regarded the transaction as essentially a bargain by a solicitor with the Plaintiffs, or ostensible Plaintiffs, to divide the land or other matter sued for between them if they prevailed at law, whereupon, or in consideration whereof, the solicitor was to carry on the suit at his own expense; and as the suit was tainted with champerty and maintenance, I dismissed it with costs."

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Argument.

Mr. Billing and Mr. Molesworth for the Appellants (Plaintiffs below). Even if champerty and maintenance were proved as between the Plaintiffs and their solicitor, the objection would not be available as a defence to the present proceeding, which is not to carry out any contract between the Plaintiffs, but to give effect to a legal title against Defendants in illegal occupation. It could at most only govern the discretion of the Court as to costs. There is no evidence of anything amounting to a contract at law. The agreement referred to in the evidence is unilateral, and not enforceable. There is no writing, and although a claim may be assigned without writing, the interest of a person seeking to be put in possession is not a claim, but a prospective interest in land falling within the "*Statute of Frauds*." The agreement proved is entered into with only one of several Plaintiffs, and cannot affect the rights of the others. No unfavourable conclusion can properly be drawn from the absence of the co-Plaintiffs; they were not bound to be present, and could give no evidence material to the issue raised in the suit.

The following authorities were referred to:—*Stanley v. Jones* (e), *Harrington v. Long* (f), *Story's Equity Jurisprudence*, sec. 1048, *Hilton v. Woods* (g).

Mr. Martley and Mr. Holroyd for the Respondents (Defendants below). Champerty and maintenance may be proved, without proving an agreement binding at law. No writing was necessary to the contract proved between *Phelps* and *Wardell*, which, apart from the question of champerty, was binding. No evidence was given by *Phelps*

(e) 7 Bing. 369. (f) 2 My. & K., 590. (g) 36 L. J., Ch., 911.

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to rebut the statement that he had agreed with the other Plaintiffs. [*Molesworth, J.*—If an agreement by a Plaintiff, such as that in the present case, were set up by the Defendant in an action of ejectment, how could the defence be made available at common law? Would not the Plaintiff be entitled to recover?] We may concede that he would, but there the Plaintiff would recover by a legal title, which would be independent of any champertous agreement or litigation; his title is not the result of litigation. Here there is no title without it. Until suit the Plaintiffs have no title, and the suit is proved to have originated from a champertous agreement. There is no estate in the Plaintiffs, and but for the agreement there would have been no attempt to create an interest. *Reynell v. Sprye (h), Bond v. Watson (j).*

Mr. *Billing* in reply. The Plaintiffs have a title under their miners' rights, and their interest existed before suit.

Cur. adv. vult.

March 2. MR. JUSTICE MOLESWORTH :—
Judgment.

It has been argued on behalf of the Plaintiffs, that, in order to constitute champerty, there must be a binding contract as between the parties, and that the contract must be such that, apart from its illegality, it would be valid and binding. I do not think the authorities sustain that view." In 1 *Hawkins's Pleas of the Crown, Tit, "Champerty,"* 464, and *Fitzherbert's N.B.*, 171 and 172, in commenting on the word "covenant" in the Act, it is said "The word 'covenant' extends to an agreement or promise, verbal or otherwise." Generally speaking as to matters contrary to public policy, or statute, the imputation of illegality extends to cases where the combinators rely upon an

(h) 1 DeG. M. & G., 677.

(j) *Ante*, Vol IV., M., 85.

honorary engagement between themselves which would not have been binding if for a legal purpose. In such cases, too, parol evidence is admitted to show the true state of facts and the illegalities. The authorities for this are in *Taylor on Evidence*, section 1,039, and *Sprye v. Porter* (k). In that case the written agreement sued upon was, so far as it was set forth, legal, and the Court decided upon demurrer that it was so; but there was a plea setting out the true state of the parol bargain between the parties, which disclosed facts which made it objectionable on the score of champerty. In an ordinary case, as between the parties to a written contract, the Court will not go outside the written document; but in this case the Court treated it to be clear that the true contract between the parties could be set out, and that if it disclosed champerty the Plaintiff should be defeated. It has also been held in many cases that the objection is not confined to dealings which would be absolutely criminal. A dealing running counter to the policy of the law, although the parties would not be criminally responsible, comes within the principle that the Court will not sanction an illegal contract—*Reynell v. Sprye*. The actual evidence in the present case is short. There was only one Plaintiff present and he was examined. He said—"I am one of the Plaintiffs. I am a miner, now living at Dunolly. Mr. *Phelps* is my attorney. I have not supplied him with any funds. *Phelps* is to receive half a share; if there were twenty, he would receive half of each share. There are nine jumpers; I am one of the nine. *Phelps* is to receive half of my share. *Phelps* has arranged with the others for himself." It is alleged that he spoke only from hearsay, but the evidence was apparently received without objection, and there is no knowing how far, if further inquiry had taken place, it would have appeared that the statement was based on admissions made by the other Plaintiffs, which would take it out of a case of hear-

(k) 7 Ell. & Bl., 58.

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say. "I know Mr. *M^cLeish*, one of the Defendants. I admit I did ask him for money. I asked him first for work. He said he had none. It would have been a gift, and not a loan, if I had received it. I had been acquainted with him. I was in this case when it was launched. I was in New South Wales. I heard of it at Deniliquin. I was told a letter lay there for me. *Phelps* was to have half my share, and bear the cost. I have worked eight weeks for *Phelps* as a day labourer." This is material, as shewing that he was a man not likely to embark in mining speculations; that the relations between him and *Phelps* were those of master and servant, and not as attorney and client. "I authorised *Phelps's* clerk to get my miner's right. I gave him no money." Mr. *Phelps* was also examined. He says:—"I paid for all these miners' rights which I now produce. They belong to the nine Plaintiffs respectively. I was instructed by these several parties to use these miners' rights, and took them up in their names. Cross-examined.—It is true that I am getting a share with the others. I expect to get a share from every man; that is, a portion of the fee. I may have said 'I will not leave the Defendants alone. I will spend every farthing I am worth to get a share in that claim. I'll jump that claim.'"

Most of the cases on champerty are those in which contracts tainted with champerty are sought to be enforced, and it was held that, as illegal, they could not be enforced. There are also cases in which the rights of the parties to the proceedings were shown to be the result of a bargain savouring of champerty, and in which it was held that the courts would be, in effect, executing a bargain tainted with champerty if they allowed it. *Moore v. Creed* (l), *Harrington v. Long* (m), *Cholmondely v. Clinton* (n). But there is no case in which

(l) 1 Dr. & Wal., 521.

(m) 2 Myl. & K., 590.

(n) 4 Bligh, 1.

a Plaintiff who has a right, making a bargain with the solicitor whom he employs savouring of champerty, has been defeated in his rights in consequence of that bargain, otherwise a man would be outlawed, because, in such a case, he employed such a solicitor on certain terms. There is one case in which it was held that a bargain of champerty was not a ground for defeating the rights of a Plaintiff otherwise good — *Hilton v. Woods* (o). There the judgment commenced with a distinction, to which I shall advert presently as distinguishing that case from the present, [that the authorities clearly show that where a Plaintiff has originally a good title, he is not to be defeated on the ground of the mode of remunerating the attorney whom he employs. It was thus held that a bargain for the conduct of a suit founded upon champerty and maintenance was no reason why the Plaintiff should fail, on the distinction that the Plaintiff's rights were not founded upon champerty and maintenance. The inference to be drawn from the evidence here by any man of common sense is that these Plaintiffs were, not parties having a good claim and looking for an attorney to appear for them, but of an attorney coveting the ground of the Defendants and looking for clients to commence the suit, who were in such a position that miners' rights had to be bought for them to distinguish them from the rest of the population. This is not a claim originally independent of champerty, but in its inception and concoction based upon champerty and maintenance. The decree appealed from will be affirmed with costs.

Decree affirmed with costs. Refer to Master to tax. Deposit to be applied in part discharge of the costs, and the overplus, if any, to be refunded.

1869.
 COLLINS
 v.
 HAYES.
 Judgment

1869.

February 25.
March 15.

CAWLEY AND OTHERS v. LING AND OTHERS.

One person cannot, by obtaining a multiplicity of miners' rights in his own name, legally occupy a multiplicity of single men's claims; for the Act No. 291, sec. 3, does not enable a person to multiply himself, or his powers, by multiplying his miners' rights.

SPECIAL case stated by a Warden at Smythesdale as follows:—

"This was a complaint before me, dated 18th November, 1868, by which the complainants sought that it might be declared that they were entitled to take possession of, obtain registration for, and occupy under and by virtue of their miners' rights, as and for a quartz claim under the provisions of the by-laws in force for the mining district of Ballarat, a portion of certain Crown lands in the possession of Defendants, situated at Grassy Gully, near Rokewood, containing an area of 1,000,000 superficial feet, or thereabouts, and alleged to be held by the Defendants as and for a party claim under the provisions of by-law No. III. of the Mining Board of Ballarat, and for which the Defendants made application for registration on the 18th day of July, 1868, to the mining-registrar of the division wherein such Crown lands are situated; and that it might be declared that the Defendants were in illegal occupation, and illegally retained possession of the said Crown lands or a portion thereof.

"Such complaint came on for hearing before me on the 26th day of January, 1869, when both parties appeared by counsel. Upon behalf of the Complainants, evidence was given that in the month of July, 1868, Defendants made application for, and within the time prescribed obtained registration of, the ground, subject of the proceedings before me; that the quantity of ground taken possession of was twenty-four men's, that such application was made by nine men, who produced to the registrar twenty-four miners rights, multiplied in the following manner:—Two miners' rights issued to *James Ling*; five do., *Charles Medcalf*; five do., *Charles E. Lawrence*; three do., *Duncan Longdon*; three do., *A. C. MacDonald*; two do., *Robert Reid*; two do., *John M'Lean*; one do., *William Roberts*; one do., *Samuel Newman*. That *James Ling*, mentioned in the two miners' rights; *Charles Medcalf*, mentioned in the five miners' rights; *Charles E. Lawrence*, mentioned in the five miners' rights; *Duncan Longdon*, mentioned in the three miners' rights; *A. C. MacDonald*, mentioned in the three miners' rights; *Robert Reid*, mentioned in the two miners' rights; and *John M'Lean*, mentioned in the two miners' rights—were respectively one and the same person. That under the twenty-four miners' rights issued to the nine Defendants, they obtained registration for twenty-four mens' ground, and are now in possession of same. That the Complainants were the holders of sufficient miners' rights to entitle them to take possession of fifteen men's ground as and for a quartz claim, under by-law No. III. of the Mining Board of Ballarat. The

miners' rights of all the Complainants were put in evidence, and proved as being in force at the time the complaint was entered, and at the hearing. Evidence was also given that the fifteen men's ground which Complainants asked to have it declared that they were entitled to take possession of, was the northern portion of the ground in Defendants' possession.

1869.
 CAWLEY
 v.
 LING.
 Statement.

"Counsel for the Complainants contended that a multiplicity of miners' rights issued to one and the same person, would not entitle such person to take up one man's ground for each miner's right held by him, under the statute and by-laws in force for the mining district of Ballarat, and that such being the case, the Defendants were in possession of more ground than they were entitled to—*id est*, fifteen men's ground; and that the Complainants were entitled, under the provisions of such statute and by-laws, to have it declared that they were entitled, as being the holders of sufficient miners' rights, to take possession of the same.

"Pursuant to the provisions of the 194th section of the '*Mining Statute 1865*,' I have reserved for the opinion of His Honor the Chief Judge of the Court of Mines, the following question:—Can one person, by obtaining say five miners' rights in his own name, make application for, obtain registration for, and retain possession, under the provisions of the '*Mining Statute 1865*,' and by-law No. III. of the Mining Board of Ballarat, of five men's ground?"

Mr. Webb for the Complainant before the Warden.—The policy of the "*Mining Statute 1865*," No. 291, was that every person taking out a miner's right, might take possession of a parcel of Crown land of such size as the by-laws might provide. It was never intended that any one person, by taking out a multiplicity of miner's rights at five shillings each, might monopolise an entire gold field. The intention of the Legislature in leaving it to the Mining Board of each district to determine the size of individual claims, was, that they should determine, having regard to the nature of the mining in the district, how much ground each individual miner should be allowed; not that they should determine on behalf of the Crown how much land should be occupied for the payment, as a rental, of five shillings, the price of a miner's right. Section 5 of the Act, defining what land the holder of a miner's right shall be entitled to occupy, is to be read distributively, as "any

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 —
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person who shall be the holder of a miner's right may take possession of a parcel," and any number of persons in conjunction who shall each be the holder, &c., shall take possession of so many parcels, &c. It may be said that some of the by-laws favor the construction of the Act contended for by the other side; but if so, they are to that extent *ultra vires*, as they cannot control the Statute, or confer any more extended privilege on the holder of a miner's right, than is given by the Statute itself.

Mr. *Trench* and Mr. *J. W. Stephen* for the Defendants below.—There are no negative words in the Statute restricting any one person from taking out more than one miner's right. Under the old Act, No. 32, there was no advantage in any man taking out more than one miner's right, because it was a sort of personal license similar to a license to kill game; and with one miner's right a man might hold either one, or a hundred, claims in any district. But under the new Statute the miner's right is to be regarded as a sort of title deed to each claim, and a man must have as many miner's rights as he has claims. This is evident from the 7th section of the Act, which provides that the miner's right under which any claim is held, may be transferred to the assignee of such claim. No mischief, such as suggested of a monopoly, can arise from one person being the holder of a multiplicity of miners' rights and claims, inasmuch as by-law III., section 23, provides that the owner of every claim shall *bona fide* proceed to work and continue to work upon such claim "according to the usual practice of efficient mining;" so that claims cannot be taken up and allowed to lie idle, but all claims taken up must be worked by a sufficient number of miners. The same by-law, section 14, also contemplates one person being the holder of more than one miner's right, for it says "possession may, by the holder or holders of sufficient miners' rights," be taken, &c.

Mr *Webb* in reply. The objection as to creating a monopoly, is not removed by the by-law referred to; for that only provides for the efficient working of a claim: and it was not the intention of the Act, that one person should, by taking up a multiplicity of miners' rights, be able to take possession of an entire district, and convert all the other inhabitants into hired laborers, for the purpose of complying with the by-law.

Cur. adv. vult.

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 v.
 LING.
 —
Argument.

MR. JUSTICE MOLESWORTH :—

March 15.
 —
Judgment.

I have to deal with a question in the form of a special case, reserved by the Warden at Smythesdale :—" Can one person, by obtaining say five miners' rights in his own name, make application for, obtain registration for, and retain possession, under the provisions of the '*Mining Statute 1865*,' and by-law No. III. of the Mining Board of Ballarat, of five men's ground?"

The obvious general meaning of the Act as to mining, is to enable all persons, paying for documents called miners' rights, a small tax—which may be quite disproportioned to the value of the property obtainable—to take possession of Crown lands and mine, the person first occupying thereby acquiring title. There is nothing to indicate an intent to give a rich person an advantage over a poor, except the requiring this capitation tax. But it was obviously necessary for the interests of miners, to prevent a first occupant taking more than a reasonable share of public property at under-value, and obstructing the industry of all others to whom equal encouragement was due; and accordingly the mining boards were authorised to limit the quantity taken by each, or by several conjointly, and to subject him or them, afterwards to forfeiture for inactivity; and the Act left this matter entirely in

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 CAWLEY
 v.
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 —
Judgment.

their discretion. But it seems to me totally contrary to the spirit of the Act, to allow an advantage as to original taking up to be purchased by paying a multiplied tax. After claims are taken up and registered, the Act makes them assignable; and then if they prove valuable, wealthy persons are enabled to purchase with the advantage which they have as to acquiring all kinds of property, the first taker selling, getting in the price the advantage of his superior sagacity, activity, or fortune.

The Act No. 32, was always construed as giving an equality to all holders of miners' rights; but some have found in the Act No. 291, indications of an intention through miners' rights, to offer Crown lands at a tax proportionate to the surface occupied. If revenue was at all an important object with its framers they, I suppose, would have sought it by competitive sales—would, at all events, have fixed a maximum quantity to be held by the person paying 5s. a year, instead of leaving it to the discretion of local boards representing miners, probably disposed to benefit themselves at the expense of the public purse. The arguments for the surface rent system are, I think, quite insufficient. The Act expressly provides for amalgamation, and has in the interpretation clause a difference from that of No. 32, giving the name "claim" to amalgamated claims. An inconvenience seems to have been felt by the necessity of renewing miners' rights every year, or risking property by forgetting it. This was obviated in clause 3 by enabling persons to take up miners' rights for a term not exceeding fifteen years, of which people would probably avail themselves, because the tax was made very trifling. Another inconvenience seems to have been felt by numerous partnerships or incorporated companies having to produce, for purposes of registration or litigation, their individual miners' rights. This was obviated in the same section by authorising them to take out a single miners' right for a number of persons working a

large registered claim, referable to it only; and to this it was naturally added that the individuals might hold separate miners' rights for their separate objects, but use the consolidated miners' right for joint objects, and that it might be used also for succeeding partners in the same claim. Clause 7 contains a provision that the holder of a registered claim assigning it, may assign it to one not holding a miner's right, assigning his miner's right; thus far, making a miner's right a kind of title deed, for that claim during its currency. It also authorises persons having registered claims to give shares, or interests in them, to persons not holding miners' rights, provided (sections 7 and 8) the entire claim is represented by a sufficient number of miners' rights. This would, I am inclined to think, allow several miners' rights to be assigned to a purchaser from several partners. But this affords no sufficient argument for increased powers in taking up, to the holders of multiplied miners' rights. Section 3 is that which alone authorises the taking up of unoccupied land, and the provision that "any person who shall be the holder, and any number of persons in conjunction who shall each be the holder, of any such miner's right, shall be entitled to take possession, &c.," could not in any reasonable construction of the words, enable a person to multiply himself or his powers, by multiplying his miners' rights. The case of *The Albion Company v. The St. George Company* (p), regarded the right of suing on miners' rights, not the taking up of claims, the parties' rights being under old laws.

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 CAWLEY
 v.
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 Judgment.

I have been referred to the Ballarat by-law, No. III., especially sections 9, 11, 13, 14, and 53. They are consistent with the opinion that multiplied miners' rights give power to take up multiplied quantities, and rather indicate that the framers of the by-law so understood the Act; but they do not amount to expressly enacting accord-

(p) *Ante* Vol. IV., M., 37.

1869.
 CAWLEY
 v.
 LING.
 Judgment.

ing to that opinion. If they did, I should have to consider the subject, regarding sections 72 and 73 of the Act. The case from the Warden shews that the registration he asks about, was immediately after a first taking possession by the applicant for registry. On the whole, I answer his question in the negative.

JOHNSON v. THOMSON.

May 26.

A mining lease granted under the Act No. 148, is not subject to regulations afterwards published under the Act No. 291, so as to make a notice of forfeiture, gazetted under them, evidence that the lessee had forfeited his lease.

SPECIAL case stated by the Warden at Walhalla, in the Beechworth district.

Johnson, the lessee under a mining lease, dated 22nd January, 1866, granted under the Act 25 Vic., No. 148, sued *Thomson* for trespass, and *Thomson* relied for his defence upon a notice of forfeiture which, in pursuance of regulations framed under the "*Mining Statute 1865*," No. 291, was published in the *Government Gazette* of 9th April, 1869. The Warden, with other questions, asked whether the gazetted notice of forfeiture was sufficient evidence of the fact?

Mr. *Macfarland* for the Complainant

Mr. *W. V. Smith* for the Defendant.

Judgment.

MR. JUSTICE MOLESWORTH.—I think I shall sufficiently deal with the present case by answering the second question only, and by saying that the lease having been granted under the Act No. 148, and regulations having been promulgated under the "*Mining Statute*" declaring a certain publication to be evidence of the forfeiture of a mining lease, those regulations could not vary the terms of a lease granted under the former Act, and create a new

mode or evidence of forfeiture. I answer that the lease was not subject to regulations afterwards published, so as to make a notice of forfeiture gazetted under them, evidence that the lessee had forfeited his lease.

1869.
JOHNSON
v.
THOMSON.
Judgment.

TAYLOR AND OTHERS v. STUBBS AND OTHERS.

May 27.

SPECIAL case stated by a Warden at Maryborough as follows:—

A Warden has no power, before the return of the summons, to make an order to substitute service.

"The summons was returnable April 12th. On April 8th, between the date of the summons and the date on which it was made returnable, an application was made by the complainants' attorney before me in chambers for an order to substitute service on forty-five of the Defendants, supported by affidavits [annexed, and showing that Defendants were avoiding service.] Eight Defendants had been properly served. I made an order [annexed] substituting service on the forty-five. The complaint came on for hearing, the Plaintiffs appearing by attorney, but no one appearing for the eight Defendants until I had agreed to reserve the case as hereinafter mentioned, when Mr. *Trench*, their counsel, stated that he would appear for them, but there was no appearance for any of the other Defendants. The Plaintiffs' attorney then tendered and filed an affidavit showing compliance with my order for substituted service. The learned counsel, as *amicus curiae*, and not on behalf of any of the Defendants, conceded that I had full power to make an order substituting service, but that this power could only be exercised on the return of the summons. Having some doubts as to whether I had power to make the said order before the return of the summons, I consented to state a special case, and the question submitted is, 'Had I, as Warden, the power to make an order to substitute service before the return of the summons.'"

Mr. *Bunny* for the Complainants. The case ought not to have been sent in the form of a question, as an order has been made which might have been appealed from. A form of affidavit to substitute service is given in the schedules to the general rules for proceedings before Wardens. Rule 5, referring to substituted service at the hearing, does not limit the Warden's general jurisdiction.

Argument.

1869.
 TAYLOR
 v.
 STUBBS.
 —
Argument.

Section 180 of the Statute enables him to dispense with service altogether, and he may direct any mode of service as a preliminary to proceeding in the absence of parties interested.

Mr. *Trench* and Mr. *J. W. Stephen* for the Defendants. The form of affidavit of "ineffectual effort to serve" given in the schedule to the rules has not been followed, and the order is not made on sufficient materials. We contend, however, that the Warden has no jurisdiction before the hearing to order substituted service, on any materials. The Court of Chancery orders substituted service in the exercise of an inherent jurisdiction, but the Warden's jurisdiction is purely statutory. The rules are framed with reference to section 180 which does not contemplate dispensing with service before the hearing, and cannot enable him to provide a substitute for service until that time. He has, in effect, a larger jurisdiction than that which he has assumed. He may decide whether there has been that which should be held to amount to service, and may proceed to hear the case as if service had been effected; but he cannot make an order by anticipation as to what is to be accepted as a sufficient substitute.

Mr. *Bunny* in reply.

Judgment.
 —

MR. JUSTICE MOLESWORTH.—Section 180 gives the Warden a wide discretion as to the practical sufficiency of the service of the summons, on persons defectively served; and as to the interest of those not served, being adequately represented by those who are; and it gives a power of adjournment, apparently in connection with this subject of service. It is material, that this discretion as to the absent, should be exercised, not on an *ex parte* application, but after hearing those who are present; in order that the latter may, if fitting, have the assistance of the former, and greater facility in enforcing contribution from them. There is

not a word in the statute which authorises dispensing with service before the return of the summons; and it does not treat the cause as constantly in Court, between the summons and its return, except for payment into Court and other specified purposes.

1869.
TAYLOR
v.
STUBBS.
—
Judgment.

The general rule 5, and the forms of affidavits in the schedule, were intended to work out the policy of this section, at the first hearing giving the Warden means to decide on the sufficiency of service or attempts at service, the adequate representation of those not served, or the means of best procuring their presence. Perhaps the heading "Affidavit to substitute service" has led to a mistaken idea that the practice should be similar to that of the Supreme Court. As to the Warden having made an improper order, the other parties properly appeared to notice an excess of his power, which otherwise he should have noticed himself. I answer the question by saying "The Warden had not the power to make an order to substitute service before the return of the summons."

ATWELL AND OTHERS *v.* RYAN AND OTHERS.
ATWELL AND OTHERS *v.* LANDRIGGAN AND OTHERS.

SPECIAL cases stated by the Warden at Alexandra, in the Beechworth district.

May 26, 31.

Provisional
claim-holders
of frontage
claims under
the Beech-
worth by-laws
are bound to

The summons in each case alleged that the Defendants, being registered as the holders of a frontage claim at South call upon the mining surveyor of the division to act under by-law 19, when the lead is discovered, and his office is within ten miles of the claim; but where it is not within ten miles, although the provisional claim-holders are not bound to apply, any person interested is entitled to call upon the surveyor to mark off substituted claims, and he should do so along a straight line to avoid overlapping, and taking measures to inform the provisional claim-holders of what he is doing; and as soon as he so lays off the substituted claims, the successive claim-holders, not working, become liable to penalties.

1869.
 ATWELL
 v.
 RYAN.
 —
 SAME
 v.
 LANDRIGGAN.
 —
 Statement.

Working Miners, at Gaffney's Creek, the progressive numbers being 38 in *Ryan's* case, and 35 in *Landrigan's*, abandoned and forfeited same by not taking up and holding same pursuant to Beechworth by-laws, and by not working same, and by totally abandoning and absenting themselves from the same when the mining surveyor laid off the frontage claims on the lead, when discovered.

It was proved or admitted that Defendants took up frontage claims 38 and 35 on a supposed deep lead, and complied with the requirements preliminary to the discovery of the lead. That on or before 10th January, 1869, the prospectors reported to the mining surveyor their discovery of the lead, and he proceeded to the ground on the 11th. Difficulties arising, he discontinued the survey, and posted on a public house and on the prospectors' shaft a notice as follows:—"I hereby give notice that the survey of none of the frontage claims on the Working Miners' Lead have been completed, and I will attend on or about the 18th instant for the purpose of completing the survey of the lead." That on the 22nd the surveyor recommenced his survey, and laid off thirty-four claims south of the prospectors, he taking it as admitted that the depth of the sinking was over 100 feet, and being guided as to the course of the lead by the opinions of the miners present, and giving each claim 90 feet on the course of the lead. That the prospectors had actually discovered a lead within their boundaries at the time they so reported to the surveyor, and since the laying off another shaft had bottomed, about No. 29, striking payable gold. That for seventeen only of the claims, owners or representatives were present in the proper order. That in *Ryan's* case one of the Defendants spoke to the surveyor during the survey, and the surveyor said he would go in proper order, but the Defendants did not make any demand at the proper stage, or tender any survey fee, neither did they apply to the surveyor prior to the summons, or do any

work on the claim which would have been No. 38 had it been laid off. That in *Landrigan's* case the Defendants did not make any demand at the proper stage, or tender any survey fees, or apply to the surveyor afterwards, and on the boundary line between 34 and 35, the Defendants' claim, the surveyor put in one peg, and from 22nd January to the date of the summons no work was done by the Defendants. That (as to the operation of by-law 19) the surveyor had no office or temporary office within the ten miles, unless the notice referred to, which was not kept up after 22nd January, can be taken to have created a temporary office.

1869.
 ATWELL
 v.
 RYAN.
 —
 SAME
 v.
 LANDRIGGAN.
 —
Statement.

The questions asked were:—In *Ryan's* case, "Whether the neglect of the Defendants is proof of an abandonment under the circumstances, and in view of the terms of the frontage by-law." In *Landrigan's* case, "1st. Was the surveyor justified under the 14th by-law in assuming the existence of the lead to the distance of the Defendants' claim? If so, 2nd. Did the surveyor lay off a claim for Defendants sufficiently to render the claim forfeitable in default of working? And, in the event of the last question being answered in the negative, 3rd. Is the neglect of the Defendants to move the surveyor to lay off their claim, a proof of abandonment in view of the terms of the frontage by-law?"

Mr. *W. V. Smith* for the Complainants. The surveyor's notice made the hotel his temporary office, and the claim-holders were bound to apply to him under by-law 19, but whether that was so or not the obligation to work is created by the discovery of the lead; and if by-law 8 is not complied with the claim is forfeited without reference to by-law 19. There is no pretence that work was done under by-law 8, and the Defendants made no attempt to get anything in lieu of that which they had forfeited.

Argument.

1869.
 ATWELL
 v.
 RYAN.
 —
 SAME
 v.

LANDRIGGAN.

Argument.

Mr. *Bunny* for the Defendants. By-law 19 has no application, as the surveyor's office was not within ten miles of the claim, and the surveyor's notice did not purport to appoint any temporary office. It is consistent with the facts as stated that the Defendants were waiting for the surveyor to lay off their claims at the time fixed by his notice, which was "on or about" the date named by him. The forfeiture contemplated by by-law 14 is not an absolute forfeiture, which any one may take advantage of in the first instance, but a displacement of former rights, for the purpose of enabling those possessing them to substitute new rights, which the surveyor is to adjust between them.

Mr. *W. V. Smith* in reply.

Cur. adv. vult.

May 31.

Judgment.

MR. JUSTICE MOLESWORTH.—These cases present great difficulty, the Beechworth by-laws being so framed as to be nearly unintelligible in regard to the subject of them. The Plaintiffs sought to be put in possession of wet frontage claims, for which the Defendants were registered, on the Working Miners', Godfrey's Creek, district of Beechworth (discovered by prospectors), as forfeited by the total inaction of the Defendants respectively. Before 10th January, 1869, the prospectors reported to the surveyor (I presume of the division) the discovery of the lead. He proceeded to the ground on the 11th; finding difficulties, he posted notices that the survey of none of the claims had been completed, and that he would attend on or about the 18th, for the purpose of completing the survey of the lead. On the 22nd he recommenced the survey, and laid off thirty-four claims—the Defendants holding numbers beyond that—giving each claim ninety feet, on opinion expressed that the depth of sinking was over 100 feet. The general idea of the by-laws, as to frontage claims, is

that they shall be laid off provisionally on a supposed lead, each not exceeding sixty-five feet along it by a width not exceeding a mile; that when the lead is discovered as to direction and depth, the surveyor shall mark off claims in the same order upon the discovered direction of the lead, of lengths more or less than sixty-five feet, according to the ascertained depth of the lead, the provisional claimholders having (with exceptions I need not notice) new claims given to them in substitution for their former claims.

1869.
 ATWELL
 v.
 RYAN.
 —
 SAME
 v.
 LANDRIGGAN.
 —
Judgment.

The by-law 14 directs "that a frontage claim on a supposed lead shall extend sixty-five feet by a width not exceeding a mile." It says nothing of how the supposed lead is to be fixed, but under by-law 6 miners help themselves and mark out their claims. In order that claims may not overlap, it seems to be necessary that all claims should follow the supposed line which the first marker-out adopts. By-law 14, as to frontage claims, then says, "that the holder of any claim may defer the working thereof till the lead be discovered, without rendering the claim liable to forfeiture, provided," &c., he has a miner's right marked with progressive number, and his name and number posted on the claim, "and shall within forty-eight hours after the lead is discovered and the claim laid off by the surveyor commence and carry on work," &c. A lead is defined, "a stratum of auriferous earth, at a depth exceeding forty-five feet." What is the discovery of a lead—the ascertainment of the fact of continuous auriferous earth? In how many places is gold to be found for the discovery? If a lead is discovered, how far is it to be taken to extend, and in what direction, especially if the ascertained course is crooked? Further, what is a discovery to affect claimholders beside the actual discoverers? "Upon the discovery of the lead, all claims previously occupied shall be deemed to be forfeited, and the holders thereof shall be entitled to occupy in lieu thereof claims

1869.
 ATWELL
 v.
 RYAN.
 —
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 v.
 LANDRIGGAN.
 Judgment.

as laid off by the surveyor, according to their priority of registration, excepting," &c. Priority of registration seems to take for granted that the claimholders take up each next adjoining to the last taken up, in consecutive numbers, which probably may be true in practice. This rule says nothing as to the manner of the surveyor's acting, who is to put him in motion, what he shall do to procure the attendance of parties interested, how far along the course of the lead he is to continue the assignment of substituted shares. The succeeding provisions appear to show that he may go beyond the ascertained part of the lead; that the depth of the lead may be deemed to vary; and the lengths of the substituted claims vary, according to that ascertained or conjectured depth of the lead—a further element of confusion.

Passing to by-law 19, it says that the owner of a frontage claim shall make application to the surveyor for the survey thereof within fourteen days after the discovery of the lead, and pay him his fee; but there is a provision at the end of this by-law that it shall not be imperative on any holder of a claim situate at a greater distance than ten miles from the office, or temporary office, of the surveyor, to comply with its provisions. I collect from this case that the surveyor has no office within that distance. The wardens, district judges, and I, must put the best meaning we can on these rules. They give a mere outline, and that with breaks; we have to imagine shading and colouring. The Warden seems to have thought that the lead was discovered, and I see no reason to dissent from his view. It is a matter of fact to which the claimholders seem to have assented. When it is discovered, and the surveyor is within ten miles, I think provisional claimholders are bound to call upon him to act under by-law 19, but in this instance were not; but then I think that any person interested is entitled to call upon the surveyor to mark off substituted claims, and that he should do so along a

straight line to avoid overlapping, as far as required by any person interested, from time to time, taking measures to inform the provisional claimholders of what he is doing, and that as soon as he so lays off the substituted claims the successive claimholders, not working, become liable to penalties. But I would infer from the case that the surveyor did not lay off substituted claims for thirty-five or thirty-eight, or beyond thirty-four. In *Ryan's* case, I answer that the neglect of the Defendants is not proof of an abandonment under the circumstances, so far as stated, and in view of the terms of the frontage by-law; and in *Landrigan's* case (1.) That the surveyor would have been justified, under the 14th by-law, in affirming the existence of the lead to the distance of the Defendants' claim; (2.) That the surveyor did not, so far as I can infer from the case, lay off a claim for the Defendants, sufficiently to render the claim forfeitable in default of working; (3.) That the neglect of the Defendants to move the surveyor to lay off their claim is not a proof of abandonment, in view of the terms of the frontage by-law.

1869.

ATWELL

v.

RYAN.

—

SAME

v.

LANDRIGGAN.

Judgment.

1869.

May 27.

June 7.

The question whether a person served with notice of appeal from a warden under No. 291, sec. 212, sufficiently represents all the Respondents, is a matter for the discretion of the Judge of the Court of Mines.

If an Appellant from a warden, is unable to find sufficient parties to serve, he should, within the three days fixed by the Act, serve the warden; and *semble*, that service at his residence or upon his clerk at his office would be sufficient.

Service upon the Appellant by an attorney, as on behalf of the Respondent, of a notice to produce a document at the hearing of the appeal, is not a waiver of any objection to the service of the notice of appeal.

A certificate "that the above is a true copy of the minute of my decision," signed by a warden, is insufficient under No. 291, sec. 213, as the certificate must go to the warden's order as well as his decision.

Upon the hearing of an appeal from a warden, the original register, signed by the warden, cannot be used to shew his decision and order, the Act No. 291, sec. 213, requiring a certified copy to be produced; but, upon the accidental non-production of the warden's certificate, the court may either proceed to hear the case, and receive the certificate at any time before the decision, or adjourn the hearing upon fair terms.

WHITEMAN AND ANOTHER v. MCGALLAN AND ANOTHER.

SPECIAL case stated as follows by the Judge of the Court of Mines for the Maryborough district:—

"This was an appeal from the decision of a Warden, which came on for hearing before me on the 20th day of April, 1869. When the appeal was called on, proof was given of service of notice of appeal on the 8th of March, 1869, such service being within the period prescribed by the '*Mining Statute 1865*,' sec. 212 (three days) on one of the Respondents (*Brooks Clay*), and of an unsuccessful attempt to serve two others (*Robert McGallan* and *John Ray McGallan*), and that efforts had been made to find the remaining two Respondents who had not been present in the Warden's Court, and of whom the only address that could be obtained was Melbourne. Proof was also given of service of the notice within the prescribed period on Mr. *Hoskins*, who had acted as attorney for Respondents, but who disclaimed appearing at this stage of the proceedings for the Respondents, though he raised objections to the sufficiency of the service of notice. Proof was also given that within the prescribed period a copy of the notice of appeal was given to the Warden's clerk, as and for service on the Warden, who was absent from Avoca, but it appears that it did not actually reach his hands until a day or two after the expiration of the prescribed time. Objection being taken to the sufficiency of the service of notice, the Appellants proved the service on them of the paper writing [a notice to produce a document by the Respondents' attorney], a copy of which is annexed, several weeks subsequently to the service on Mr. *Hoskins* of the notice of appeal, and contended that the service of the notice of appeal was sufficient, and if not sufficient, that the subsequent serving on them of the said paper writing was an admission of due service, or a waiver of any defect in such service.

"I proceeded with the appeal, stating, however, my intention in

" the event of my having to state a case for the opinion of the Chief Judge on any other point, to request his Honor's opinion on the sufficiency of the service. The Appellants then produced a paper writing as a certified copy of the decision, and of the order thereon, of the Warden, as required by the 213th section of the '*Mining Statute* 1865,' setting out the minute and order in full; but the certificate in its terms only applied to the minute, being as follows :

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" ' I certify that the above is a true copy of the minute of my decision on the abovenamed case, entered by me in the Warden's register at Avoca aforesaid.

" ' C. WARBURTON CARE,
" ' Warden having the custody of the said register.'

" The Respondent's attorney (Mr. *Hoskins*) thereupon objected to the reception of the said paper writing, on the ground that the Warden certified only that the said paper writing was a copy of the minute of his 'decision,' and not of his 'decision and the order thereon,' as required by the proviso in sec. 213 of the Act. I expressed an opinion favourable to the objection, on which the Appellants' counsel tendered (by the clerk of the court) the register in which the minute of the Warden's 'decisions and the orders thereon' are entered under the 193rd sec. of the Act, and from which minutes the certified copies directed by the 213th sec. to be produced at the hearing of appeals are taken. The attorney for the Respondents admitted that the minute of the decision and order thereon in the register was signed by the Warden, but objected to its being received as a compliance with the proviso in the 213th sec. of the Act, as that clause required, not the production of the minute, but of a certified copy thereof. Having some doubts on these objections, and whether if the objections were tenable I ought to dismiss the appeal, or adjourn the cause to the next sittings and permit the Appellants then to produce at the hearing a duly certified copy of the Warden's minute, I reserved the following questions for the opinion of his Honor the Chief Judge of the Court of Mines :

- " 1. Was the service of the notice of appeal sufficient ?
- " 2. If not sufficient, was service admitted or waived by the subsequent service on the Appellants of the paper writing hereunto annexed ?
- " 3. Ought I to have admitted the paper writing herein set out as a duly certified copy of the Warden's decision and of the order thereon under the proviso in the 213th sec. ?
- " 4. Should I have permitted the Warden's register to be produced at the hearing for the purpose of complying with the requirements contained in the said proviso ?

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" 5. Presuming that the register ought not to be so produced, and
 " that the paper writing was insufficient, should I have dismissed the
 " appeal, or should I, or had I the power, to give the Appellants an
 " opportunity of obtaining and producing at an adjourned hearing, a
 " duly certified copy of the minute of the Warden's decision and of the
 " order thereon?"

Argument.

Mr. *Trench* for the Complainants. The notice of appeal is sufficient, as the Respondents' solicitor has waived any irregularity in service, by serving the Appellants on behalf of all the Respondents with a notice to produce. Service on the Warden's clerk is sufficient, when the Warden himself cannot be found. Only three days are allowed for serving the notice, and in many cases service on the Warden in person within that time would be impracticable. Production of the original register is sufficient compliance with section 213, as to the minute of decision. No copy is required when the original is produced.

Mr. *Atkins* for the Defendants. Notice to produce does not preclude an objection to insufficient service. Service on the Warden is no efficient substitute for service on any of the parties under the circumstances. The Warden ought not to have been served until after the three days which are allowed for actual service on the parties, and which should be employed in endeavouring to effect it. The Act makes no mention of the Warden's clerk, and service on him is no service on the Warden. The Warden's certificate is clearly imperfect, and the concluding proviso of section 213 is imperative, making the certified copy an essential preliminary to appeal, for which nothing can be substituted.

Mr. *Trench* in reply.

Cur. adv. vult.

MR. JUSTICE MOLESWORTH :—

Special case from the learned Judge of Court of Mines, Maryborough. Mr. *McGallan* and four others had proceeded against Mr. *Ward* and another before the Warden at Avoca, and got a decision and order. The Defendants appealed. They duly, within three days, served notice of appeal on one of the Plaintiffs only, made unsuccessful efforts to serve two others, and were unable to find two others. They also within the same time gave a copy of the notice of appeal to the Warden's clerk, when the Warden was absent on his duty, which came to the warden's hands, after the three days. Objection was taken before the learned judge to the sufficiency of this notice of appeal. The "*Mining Statute 1865*," 296, section 212, directs Appellants "to serve upon the parties interested in supporting "such decision, or upon such of them as shall appear to "such Court to represent all the parties interested, or, in "case no such person shall be found, upon the Warden "before whom, or before whom and assessors, the case in "which such decision shall have been made was heard, a "notice in writing, stating the intention to appeal," &c.

The great number of persons interested in mines, and the difficulty of finding them, have induced the framers of the mining Acts freely to provide for the hearing of cases after service of summons upon some only of the parties interested, provided that the judge be satisfied that those served sufficiently represent the interest of those not served.

Some facts in this case make me think that all the Plaintiffs before the Warden had acted by the same attorney, and that the Plaintiff served had been especially in communication with him as to the conduct of the case. If so, I should be inclined to think that the person served did sufficiently represent the co-plaintiffs; but the case

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does not expressly state any facts bearing on the subject. It is a matter for the discretion of the district judge—see *In re Rogers (p)*, on the corresponding clause in the Act No. 32. The judge, if he hold the persons not served not sufficiently represented, should next consider whether they could be found, as to which, regarding the short time allowed for serving the notice, an Appellant should be treated with much indulgence. If the judge hold that they could not be found, he then should consider the service upon the Warden. It was argued ingeniously before me that service upon the Warden should be after the three days, as all that time should be employed in trying to find, but I think the words of the Act will not bear that meaning; if there is not the three days' limit as to the service, there is no limit. I think the Appellant, being unable to find sufficient parties to serve, should within the three days serve the Warden. The Act does not prescribe the manner of service upon him, and his business is so ambulatory that he may not be easily found in a hurry. I would be disposed to say that service at his residence should be enough. The statute speaks often of clerks of district courts, never of Wardens' clerks, and the latter are not, I think, officers recognised by it so as to represent Wardens. Sections 167 and 225 recognise Wardens' offices, and if his clerk was served at his office I would think it sufficient.

It was insisted for the Appellants that the Respondents were precluded from objecting to the regularity of the appeal because an attorney, as on behalf of the Respondents, had served the Appellants with notice to produce a document at the hearing of the appeal. This did not, I think, cure the objection; first, because the attorney was not shewn to have been authorised by the Respondents. But even if he were, a notice to produce is contingent upon a case going on, and does not preclude the person serving it from insisting that it should not go on. It is

(p) *Ante* Vol. II., L., 84.

not like the effect of a request to postpone a case, as *In re Hertfordshire* (q), as a recognition that it should go on without preliminary objection.

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The learned judge proceeding to hear the case without finally deciding as to the service of notice, the Appellants produced a copy of the decision of the Warden, and of his order in the case, having his signature at bottom, and then a certificate, "That the above is a true copy of the minute of my decision in the above-named case, entered by me in the Warden's register at Avoca aforesaid." (signed) "C. WARBURTON CARR, warden having the custody of the said register." This was objected to by the Respondents, under section 213, which provides that "No such appeal shall be heard, unless at the hearing "of such appeal a copy of the minute of such decision, and "of the order thereon, signed and certified under the hand "of the Warden, shall be produced to such Court." The certificate was objected to as relating to the decision only, not to the decision and order. Section 193, and the schedule it refers to, clearly distinguish between a decision and an order. It provides that copies of the register certified by the Warden having the custody of it, shall be admitted in all courts as evidence of such decision and order, and, coupling the two sections, I should be disposed to hold that the certificate, if it had been "the above is a true copy of the minute in the above-named case, entered by me in the Warden's register at Avoca aforesaid," would have been good; but I think that the particularising of the decision makes it cease to be a certificate as to the order, and therefore, to be a certificate under section 213. The learned judge, being disposed to yield to this objection, the Appellants sought to use the register itself, but, I think, from the language of the clause, requiring a copy, the original could not be used, but the contents of the register might properly influence the learned judge as to

(q) 4 B. & Ad., 561.

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postponing the case. The objection was one of very strict form, originating in the oversight of the Warden whose decision was appealed from, and whose temporary absence presented an obstacle to the oversight being rectified, so it was a case in which every reasonable indulgence should be given to the Appellants. The same and subsequent clauses give the district judge full power of adjournment, &c. I held in *Crocker v. Wigg* (r), that upon the accidental non-production of such certificate, the Court might proceed to hear the case, and receive the certificate at any time before the decision, and I think the judge might adjourn the hearing for the same reason upon fair terms.

The first and part of the fifth queries sent to me, involve questions of discretion to be exercised by district judges on materials not easily expressed in a special case. I answer—1. So far as disclosed in the case, the service of notice of appeal was not sufficient. 2. Service was not admitted or waived by the subsequent service on the Appellants of the paper writing. 3. The paper writing in the case set out, ought not to have been admitted as a duly certified copy of the Warden's decision and of the order thereon. 4. The Warden's register should not have been received at the hearing for the purpose of complying with the 213th section. 5. As far as I can judge upon the materials in the case, I think the learned judge should not have dismissed the appeal upon the certificate objection, but had the power to give, and should have given, the Appellants an opportunity of obtaining and producing, at an adjourned hearing, a duly certified copy of the minute.

(r) Chief Court of Mines, March 23, 1868, *Ante* Vol. V., M.

CHIEF JUDGE OF COURTS OF MINES.

BRYSON AND OTHERS *v.* MCCARTHY AND OTHERS

SPECIAL case stated by the Warden at Bairnsdale follows:—

“ In a suit before the Warden at Bairnsdale between the above-
 “ parties to obtain possession of a portion of a claim held by Defendants
 “ at Lower Boggy Creek (delineated on a plan in the Warden’s office
 “ Bairnsdale by the letters ROMK), it appeared that on 7th April, 1868,
 “ an order was made in a suit before the Warden, in which McCarthy
 “ and others were Plaintiffs and McDiarmid and others Defendants,
 “ declaring a certain claim held by the latter abandoned, and possession
 “ of a portion thereof (delineated upon a plan in the Warden’s office
 “ the letters POKL) was ordered to be given to McCarthy and others.
 “ On 8th April McCarthy and party pegged and registered a claim
 “ four men, as worked and abandoned ground, under the 29th by-law
 “ the Gipps Land Board, consisting of an area of 400 yards by 100
 “ wide. This area being the ground shown upon the plan as mentioned
 “ above by the letters ROMK, included within itself the lesser
 “ POKL. On 19th May McCarthy and party re-registered their claim
 “ defining it in the registration by the terms used in the Warden’s
 “ decision, by which possession of the land delineated by the letters
 “ POKL was ordered to be given. The ground outside the area POKL
 “ but within the area ROMK, is either maiden ground, or has not been
 “ the subject of a Warden’s declaration of abandonment. The following
 “ questions having arisen, are submitted:—‘ Can a claim be occupied
 “ under the 29th by-law of the Gipps Land Mining Board, which
 “ includes in its area other lands than those the subject of a Warden’s
 “ declaration of abandonment under the 17th by-law, assuming
 “ such other lands have not been previously occupied by Defendants?
 “ 2. If not, is the whole area illegally held, or is that portion only
 “ the area only affected; or is such claim liable to be reduced to
 “ ordinary single area for four men, and are the Plaintiffs entitled to
 “ surplus.’ ”

Mr. Kerferd, for the Defendants, referred to *Mulcahey v. The Walkalla Company* (s), and *Oxley v. Little* (t).

No appearance for the Plaintiffs.

Cur adve

(s) Sup. Ct., Vic., 19th May, 1868, *Ante*, Vol., V., Eq. (t) Ch. Ct. of M., 18th May, 1868, *Ante*, Vol. V., M.

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 BEYSON
 v.
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 ———
 September 6.
 ———
 Judgment.

MR. JUSTICE MOLESWORTH:—

This was a special case from the Warden's Court, Bairnsdale. The present Defendants, *McCarthy* and others, procured as Plaintiffs in a suit before the Warden, a declaration that a claim was abandoned by the then Defendants, and by the Warden's order (7th April) obtained possession of a portion of that claim. I am somewhat confused by having been sent two plans not exactly the same, but I understand that *McCarthy* and others pegged out a greater space than they so recovered, being the space to which, under the Gipps Land by-law (4th November, 1867), they would be entitled upon worked and abandoned ground, and this they registered on 8th April. On the 19th of May they re-registered, limiting their claim to that comprised in the order of 7th April. The space which may be taken on worked and abandoned ground is greater than—I believe double—that which may be taken on untried ground; and there was no evidence that the additional space was tried, so that it should be taken as untried; but if that additional space had been worked and abandoned, *McCarthy* and others might have joined it, in one claim with that which they had recovered.

I would say on the case that *McCarthy* and others were wrong in taking so much land; and that brings me to a difficult question—as to the position of claimholders taking more space than they ought, where the by-laws make no provision on the subject. I regret that I have to deal with it in this case, without the assistance of counsel on both sides. In *Oxley v. Little*, reported in the *Argus* of 20th March, 1868, I expressed an opinion that a person taking possession, under a Warden's order of forfeiture, of more ground than he was entitled to occupy, might be limited to his proper quantity by Warden's order, intimating that his entire title was not avoided by the excess; but the facts of the case did not raise the point, and it was

not discussed. In *Mulcahy v. The Walhalla Company* no question on the subject was raised before me, but the Defendants (Appellants) appear to have objected, and insisted before the full Court that the Plaintiffs had taken up too much ground as a claim, and therefore that their title was altogether bad. The full Court, as reported *Argus* 20th May, 1868, decidedly overruled the objection. That case was a suit for encroachment, so that the decision would be conformable to *Critchley v. Graham* (v), on which I have acted. Without expressing an opinion on the question in general, I would say as to this case, that the Defendants might give up the untried ground if improperly taken, and confine themselves to the abandoned ground in resisting the summons. I answer:—1. A claim may be occupied under by-law 29, which includes in its area other lands than the subject of a Warden's declaration of abandonment under by-law 17, although such other lands have not been previously occupied by the Defendants in the summons under 17; but if the claim is of the dimensions which can be taken only in worked and abandoned ground, it must, to be supported, be all in some way of that description. 2. The holding the whole area, if contrary to the above opinion, would be illegal; but, as I understand the facts and letters, the present Complainants should recover the area outside of the letters P O K L, and not that within them.

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 BRYSON
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 Judgment.

(v) 2 W. & W., L., 211.

1869.

August 23.
September 9.NOLAN v. THE ANNABELLA GOLD MINING
COMPANY REGISTERED.

The Plaintiff, a shareholder in a company registered under the Act No. 228, assented to a rule under which shares might be forfeited by directors for non-payment of calls, and was a witness to affixing the company's seal to it. Shares of other shareholders were afterwards, to his knowledge, forfeited under the rule. Subsequently his own shares were forfeited under the rule for non-payment of a call, of which, owing to an accident, he had not received notice, though notice had been given as required by the rule. In a suit against the company to set aside the forfeiture and recover the shares,

APPEAL from a decree of the Court of Mines at Sandhurst, setting aside a forfeiture by the Defendants of the Plaintiff's shares, on the ground that a Company registered under the Act No. 228 had no power to forfeit shares. The rule of the Company under which the forfeiture purported to have been made was as follows:—"Any shareholder neglecting or refusing to pay any call for the space of twenty eight days from the making thereof, and of which call seven days' notice shall have been given by advertisement in one daily newspaper published at Sandhurst, his share or shares may be declared forfeited by the directors for the time being, and such shareholder shall thenceforth cease to be a shareholder in the Company."

The plaintiff prayed that the Defendants might be restrained from alienating the forfeited shares; that the alleged forfeiture might be set aside and the shares replaced in the Plaintiff's name, he offering to pay calls and interest due from him in respect thereof. A decree was made for the Plaintiff in terms of the prayer, 2nd August, 1869.

The case was stated as follows:—

"At the hearing it was admitted that the Defendants are a mining Company, registered under the Act 228, and carrying on gold-mining

to set aside the forfeiture and recover the shares,

Held, that section 39 of Act No. 228, does not authorise the making of any rule for forfeiting shares; and that the Plaintiff was not estopped from impeaching the validity of the rule in question. Provisions for forfeiture are regarded as exceptional, and to be strictly construed.

The rules which apply to estoppel as between individuals, are not applicable as between an incorporated company, and its members.

"operations at Lower Huntly in the mining district of Sandhurst, and
 "that *John Drake Crofts*, of Sandhurst, is the registered manager of
 "the Company; that by the original rules of the Company, the nominal
 "capital is £3,200 sterling, divided into 640 shares of £5 each; that by
 "the amended rules, the nominal capital was increased to £8,000, divided
 "into 3,200 shares of £2 10s. each; that the Plaintiff was the holder,
 "under the original rules, of forty shares of £5 each therein, and
 "became, under the said amended rules, the holder of 200 shares of
 "£2 10s. each; that on the 2nd day of March, 1869, a call of 1s. per
 "share was made by the directors of the said Company; that the
 "original rules contained no provision for the forfeiture of shares in
 "the Company for the non-payment of calls, but the amended rules
 "provide that any shareholder neglecting or refusing to pay any
 "call for the space of twenty-eight days from the making thereof, of
 "which call, seven days' notice shall have been given by advertisement in
 "one daily paper published at Sandhurst, his share or shares may be
 "declared forfeited by the directors for the time being, and such share-
 "holder shall thenceforth cease to be a shareholder in the Company;
 "that on the 4th day of March, 1869, notice of the making of said call
 "of 1s. per share was given by advertisement in the *Independent news-*
 "*paper*, a daily paper published at Sandhurst; that shortly after the
 "expiration of twenty-eight days from the making of such call the
 "directors declared the said shares of the Plaintiff forfeited, for the
 "non-payment of the said call; that before issuing the plaint the
 "Plaintiff tendered to the said *John Drake Crofts* (then being the
 "registered manager of the said Company), at the registered office of
 "the Company in Sandhurst, the sum of £10 sterling, being the amount
 "of the said call of 1s. per share upon the Plaintiff's said shares, but
 "*Crofts* refused to receive the same. At the hearing the following
 "additional facts were proved:—That the mining operations of the said
 "Company were carried on on Crown lands; that the Plaintiff was
 "absent from his house (being the address registered in the books of
 "the Company as the place to which letters should be addressed to
 "him) at the time when the call was made, and that he did not return
 "until after the forfeiture had been declared by the Defendants; that
 "he left at his house an agent, whose duty it was to open and forward
 "to the Plaintiff any letters of importance that might reach him; that
 "a letter from the Defendant's legal manager, duly notifying the call
 "for non-payment of which the shares were declared forfeited had
 "reached such agent, but that the agent had not forwarded the same
 "to the Plaintiff, alleging that he considered the same of no importance;
 "that on the 20th day of May, 1869, the Plaintiff's said shares were
 "declared forfeited for the non-payment of the said call; that at the
 "time of such forfeiture the said shares were and have since been and
 "still are of the value of £1 each, or thereabouts; that no notice of the
 "intention of the directors of the said Company to forfeit the said
 "shares was given to the Plaintiff previously to the forfeiture, and the
 "Plaintiff received information for the first time of any proceedings as
 "to the forfeiture after such forfeiture had taken place; that the Plaintiff

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" had been chairman of the extraordinary meeting at which the amended
 " rules were passed, and had made no objection to the passing of them,
 " and had also been a witness to the affixing of the seal of the Company
 " to such amended rules; and that some months previously to the 20th
 " of May, 1869, the day when the forfeiture was declared by the
 " Defendants, the shares of a person named *Cummins* had been forfeited
 " by the Defendants to the knowledge of the Complainant. Counsel for
 " the Defendants made several objections, all of which were over-ruled,
 " and decree made for Plaintiff. The principal objection taken was that
 " the shares were properly forfeited, the calls not having been paid.
 " From the decision Defendants appealed."

Argument.

Mr. *J. W. Stephen* and Mr. *Helm* for the Appellants.
 There is nothing in the Act No. 228 prohibiting the forfeiture of shares by a Company formed under its provisions. Section 39 gives power to make rules for any object not inconsistent with the Act. We admit that forfeiture is not included under any of the heads specified in that section as subjects upon which rules may be made, but it is not inconsistent with any of them, and is not excluded. The particular means of enforcing payment of calls and transferring and dealing with shares mentioned in the section, are not inconsistent with enforcing payment and dealing with shares by forfeiture. Another section (37) provides that payment of calls may be enforced before two justices, but this mode of enforcement has never been considered inferentially to limit the means of enforcement to those named in the section. Considerations of convenience and justice as between shareholders are in favour of the generally received construction of the Act as permitting forfeiture. No protection to the public is given by withholding the power to forfeit; for as against creditors the extinction of liability by transfer or relinquishment of shares is as complete as by forfeiture. The Plaintiff attacks the validity of the forfeiture, and does not ask to be relieved from it. He has taken the benefit of forfeiture of other shares in the Company under the rule now impeached, and is estopped from objecting to it.

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Mr. *Martley* and Mr. *Holroyd* for the Respondent.

Legislature did not intend to give the unrestricted power of forfeiting shares, which has been assumed. If it had intended to give it at all, conditions would have been provided against an improper exercise of the power. The Act is altogether silent on the subject. Member Companies under the Act are intentionally protected against forfeiture of shares. A Company is only permitted to make rules for the purposes enumerated in section 39. The maxim "*Expressio unius exclusio est alterius*" applies to the enumerated subjects. The expression "objects inconsistent with this Act" means objects *ejusdem generis* subordinate and incidental to those specified, not different objects. The rules must be in reference to named objects or why name any? On the other construction, general words would have been sufficient, and the enumeration is surplusage. It is evident that the enumeration was intended to be exhaustive. As transfer and relinquishment are named, forfeiture would have been named if contemplated. Relinquishment is clearly referred to, excluding a proceeding *in invitum*.

Mr. *J. W. Stephen* in reply. There is no similarity between the different objects specified in the 39th section. They can constitute them a genus. There can, therefore, be no limitation to objects *ejusdem generis*. The case resolves itself into the question whether forfeiture is inconsistent with the Act, and no inconsistency has been suggested.

The following cases were referred to:—*Cotter v. Hardy* (w); *Taylor v. Patterson* (x); *Solomon v. Collier* (y); *Fenton v. Skinner* (z); *Fenton v. Schmalz* (a); *Barrett v. Stockdale Railway Company* (b).

Cur. ac.

- (w) Ch. Ct. of M., 1st Dec., 1868, *Ante*, Vol. V., M.
- (x) 2 W. & W., L., 32.
- (y) *Ante*, Vol. IV., L., 128.

- (z) 1 W. & W., L., 65
- (a) L. R., 3 C. P., 313
- (b) 2 M. & Gr., 134.

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NOLAN

v.

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GOLD-MINING
COMPANY.

September 9.

Judgment.

MR. JUSTICE MOLESWORTH ;—

This is an appeal from the learned Judge of the Court of Mines, Sandhurst, by the Defendant company—Annabella Gold-Mining Company. This company was formed under the Act No. 228, without partnership deed or rules I believe; at all events without any rule for the forfeiture of shares for non-payment of calls, so that it had no power to make such rule except under that Act. The Plaintiff, Mr. Nolan, was a shareholder in it. At a duly convened meeting at which he presided, a rule was voted and purported to be passed, "that any shareholder neglecting or refusing to pay any call for twenty-eight days from the making of it, of which call seven days' notice shall have been given by advertisement in one daily newspaper published at Sandhurst, his shares may be declared forfeited by the directors, or the directors may, if they shall think fit, debit the shareholder with the amount due from him, carrying interest at the rate of 20 per cent. per annum, or they may take legal proceedings for the recovery of such call, or sell the shares of such defaulting shareholder, and apply the proceeds to expenses of sale, the call, and debt of the shareholder, the balance to him, with power, if the balance be insufficient, to sue him." Nolan assented to this rule, and was a witness to the affixing of the company's seal to it, and was aware of the shares of another shareholder being declared forfeited under it. A call of 1s. per share was duly made by the directors on the 2nd March, 1869, and was duly advertised on the 4th. The Plaintiff was then absent from home, leaving an agent whose duty it was to forward letters of importance to him, who received a written notice of the call from the company, but did not forward it. On 20th May, 1869, Nolan's shares were declared forfeited, at which time he had no actual notice of the call or of the forfeiture, having remained absent from home. There was no attempt to give him notice of the forfeiture. Nolan, without delay, tendered the call at

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the office of the company, requested to be reinstated, was refused, and then issued his plaint for the same ob

I do not think that the Act 228 authorised the company to make rules for the forfeiture of shares of its members. The section which enables it to make rules is the 228. It enumerates various subjects of rules—number, qualification, quorum of directors; holding of meetings of shareholders and directors; election and removal of directors; the deposit and custody of proxies; removing and appointing manager, bankers, solicitor; declaring dividends, making calls; for the transfer and relinquishment of shares and the conditions on which the same respectively may be effected; for minutes of meetings; preparing balance sheets, auditing and examining them; making regulations for custody and use of common seal, and “for any other object not inconsistent with the Act.” Speaking of making rules it does not add enforcement of them; leaving that to the provisions of the Act, sections 5 and 37. It authorises rules for the transfer and relinquishment of shares by voluntary acts of the shareholders, over which other persons are interested, to see that the transferrors shall pay up when they transfer, and transfer to transferees solvent and free from debt. Other Acts for incorporating companies, such as the English “*Companies’ Clauses Consolidation Act*,” and Act 190, make definite provisions for forfeiting shares on a subject requiring distinct considerations. Provisions for forfeiture are regarded as exceptional and to be strictly construed—*Lindley on Partnership*, 617—and general including words as to powers relate to those of similar kind to those before enumerated, not to those totally different and of a class to be less readily conferred—*Maxim’s*, 625.

I have felt some difficulty as to *Nolan’s* rights from his acts of assent to the rule in question; but an assent to forfeiture is invalid even as to those who have assented

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 NOLAN
 v.
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 GOLD-MINING
 COMPANY.

Judgment.

it—*Lindley on Partnership*, 621. As between individuals estoppel from both having acted upon an assumed state of facts, precluding them from contradicting the facts assumed, are equitable in results; but as between an incorporated company and its members, to say that members having assented to, and acted upon, a rule not binding the company and all its members because illegal, or beyond its powers of law making should be estopped, would be most unjust. Majorities voting for such rule would be bound, the minorities and absentees being loose, so that the latter might enforce obligations and liabilities from which they themselves would be free. In the *Creswick Grand Trunk Company v. Hassall* (reported in the *Argus*, 19th May, 1868), the full Court held that where the property of a company under this Act was (as it considered) illegally sold under a vote at a general meeting, the company might avoid the sale against the vendors, though the instigators of the litigation had concurred in the sale, so as to have estopped themselves from objection if the sale had been of their own property. *Solomon v. Collingwood Quartz-Mining Company* raised this point as to the legality of rules for forfeiture, and in it the Court held that a chairman at a meeting was estopped from insisting on the irregularity and consequential impotence of the meeting, but apparently not from insisting that the rule was *ultra vires*.

This plaint is not framed as seeking equitable relief from forfeiture, though it states facts which might sustain it, and in its prayer offers calls and interest, so that, if necessary, I think it might be regarded as a basis for such equitable relief, as if prayed in terms. Ordinarily, courts of equity relieve against forfeiture, and I think might do so from legal forfeiture of shares for non-payment of calls in mining companies. I certainly would not be disposed to relieve in the matter-of-course way by which mortgagors or tenants are relieved from non-payment at fixed days.

I think the person seeking relief should shew something of mistake or surprise, and subsequent activity; should quite clear himself from suspicion of having held back, watching the fluctuations of the value of the mine before deciding upon keeping or leaving shares. The subject of equitable relief from total forfeiture of a share by non-payment of a call, is quite different from that of relief from a large pecuniary penalty, as in *Cotchett v. Hardy*, which I decided, reported in *The Argus*, 3rd December, 1868, on the ground that exorbitant interest is not illegal here. On the whole, I affirm the decree of the learned judge for the Plaintiff. The Plaintiff's conduct in assenting to the rules which he now infringes, I think should disentitle him to costs, even of appeal.

1869.
 ~~~~~  
 NOLAN  
 v.  
 ANNABELLA  
 GOLD-MINING  
 COMPANY.  
 ———  
*Judgment.*

*Decree affirmed. Each party to abide  
 his own costs, deposit to be returned.*

## MURPHY v. NEIL.

CASE stated as follows by the Judge of the Court of Mines at Sandhurst, on an appeal from the decision of a Warden :—

"The case came before me 28th June, Mr. *Martley* appearing for the Appellant. Mr. *Byrne*, as counsel for the Respondent, objected that the Court was not seised of the appeal, as no notice of it had been served on the Respondent. Mr. *Byrne* did not appear for any other purpose but to urge this objection. The Appellant was called on to prove service of notice of appeal. It was admitted that though the Respondent could be readily found, he had not been served personally. Evidence was given by the Appellant to shew that Mr. *Booker*, his attorney, was informed by Mr. *Brown*, who swore he was at the time

not represent his client to receive notice of appeal.

Respondents, on appeal, have a right to object to defective service upon themselves or others; and to cross-examine, or give evidence, upon controverted facts as to service.

Objections to the hearing of an appeal, as to service of notice, and preliminary objections to the hearing of a suit as to service of summons, may be the subject of a special case under section 171 of the "*Mining Statute*."

*August 23.  
 September 9.*

Section 212 of the "*Mining Statute*" does not authorise service of notice of appeal upon the authorised agent of a Respondent. The power of an attorney in a Warden's court ceases upon the decision, so that he does

1869.

MURPHY.

v.

NEIL.

Statement.

" the Respondent's attorney, that he (*Brown*) was authorised by the Respondent to accept notice of appeal from *Booker* on behalf of the Respondent; that *Booker* confiding in and acting on such statement, delivered the notice of appeal to *Brown's* clerk at Heathcote within the proper time, and that the latter forwarded it to Respondent's attorney. This clerk swore that the Respondent was informed by him that the notice of appeal had been served. It appeared that the Respondent was afterwards committed to gaol for some contempt of the Warden's Court, and remained in gaol up to the first day of the sittings of the Court of Mines; but Mr. *Brown* swore that Respondent's wife had several interviews with him at Heathcote respecting the defence of the appeal. Mr. *Brown* gave evidence that he was duly retained by Respondent to defend the appeal, and Respondent expressly authorised him to accept service of the notice, so as to avoid any angry collision with the other party. I refused to allow Mr. *Byrne* to cross-examine the witnesses, considering the sufficiency of service matter for the Court to determine for itself on such evidence as it might deem satisfactory, and that he had no right to cross-examine any witness, he not appearing to defend the appeal. Mr. *Byrne* then offered to disprove the alleged retainer to *Brown* and the alleged authority to accept notice by the evidence of the Respondent himself, who was then in Court; but, for the reasons before given, I refused to receive it. I expressed my opinion that no personal service of notice of appeal to satisfy the statutes had been proved, and declined to hear the appeal at that sitting; but though doubting whether it was lawful for me to reserve any question, inasmuch as no hearing properly so called of the appeal had taken place, I consented, at Appellant's request, to reserve the following questions:—1. It being admitted that there was no difficulty in finding the Respondent, ought the service of the notice of appeal to have been necessarily on himself personally? 2. Supposing the Appellant's attorney had been informed by the Respondent's attorney that the latter was authorised to accept service of the notice of appeal and that Appellant's attorney thereupon served the notice on his clerk, and that the Respondent's attorney was in fact so authorised by the Respondent, ought such service to be deemed sufficient to give the Court jurisdiction to try the appeal, or was the Respondent estopped from denying the validity of the service? 3. If the Court is of opinion that the Judge ought so to deem it or hold it, should he, in order to ascertain how such facts stood, allow witnesses to be examined and cross-examined; or should he examine witnesses *ex parte* only for his own satisfaction?"

Argument.

Mr. *Martley*, for the Appellant, referred to *Ward v. McGallum*, *ex parte Low* (c); *Regina v. Thompson* (d).

No appearance for Respondent.

*Cur. adv. vult.*

(c) 33 L. J., Mag. Cas., 369.

(d) *Ante*, Vol. IV., Law, 26.

## CHIEF JUDGE OF COURTS OF MINES.

MR. JUSTICE MOLESWORTH :—

This is a special case from the learned Judge of Court of Mines, Heathcote. This case originated suit before a Warden by *Neil* against *Murphy* and asking a declaration of forfeiture of a claim. *Neil* succeeded, and *Murphy* sought to appeal. He complied with the other requisites, but served his notice of appeal not on *Neil* but on Mr. *Brown*, who had acted as his agent. At the time for hearing before the learned judge, Mr. *Martley* as counsel appeared for *Murphy*. *Brown* prepared to resist the appeal on the merits; but another barrister, Mr. *Byrne*, instructed by Mr. *Phelps*, a new agent of *Neil's*, insisted that the appeal was irregular, non-service upon *Neil*, stating that he appeared with object only. It was alleged by Mr. *Martley* and Mr. *Byrne* that *Neil* had authorised *Brown* to receive notice of appeal. *Brown* told *Murphy's* attorney so, and did receive it. *Byrne* sought to contest by cross-examination and evidence the fact that *Neil* had authorised *Brown* to receive notice. The learned judge expressed an opinion *in limine*, that the facts alleged for *Murphy* were true, the appeal was irregular, but allowed evidence to be received of the truth, not allowing Mr. *Byrne* to interfere.

I have first to consider whether objections made to an appeal being heard, can be the subject of a special case under the Act No. 201, sec. 171. Preliminary questions to a hearing of a suit, as to service of summons would stand on the same footing as objection to hearing an appeal as to service of notice of appeal. As to both are difficult questions, as to the sufficiency of service of notice upon parties appearing, and which they may object to parties not appearing; and the judge may be directed, doubtfully, to overrule objections and hear, as well as to allow objections and not to hear. In the former case it would certainly be convenient that the preliminary

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MURPHY  
v.  
NEIL.

*Judgment.*

objection should be made a subject of special case, as well as any other arising during the progress of hearing. I think that the letter of the Act is not so narrow as to prevent special cases on such preliminary points under the words "on the hearing of any appeal it shall be lawful for the judge to reserve any question."

Entertaining the question, I think that the power of an attorney in a Warden's court, ceases upon the decision, so that he does not represent his client to receive notice of appeal. There is nothing in section 212 of the Act which would authorise service upon the authorised agent of a Respondent, and allowing it would frequently involve the courts of mines in the troublesome discussion of a collateral difficult question about authority, which this case strongly illustrates. I think that Respondents, when an appeal is called on, have a right to be heard to object to defective service upon themselves or others, and, if heard to object, that they have also a right to cross-examine or give evidence upon controverted facts as to service, upon the common principle of hearing both sides. In this case I have not had the advantage of hearing counsel on both sides, and am unwilling to express an opinion upon a point in one of the queries, which is unimportant, as to the necessity of personal service of notice of appeal.

I answer the queries—1. The service of the notice of appeal ought not to have been on Respondent's attorney before the Warden as his agent. 2. Supposing all the facts in the second query to be as alleged for the Appellant, the service was insufficient. 3. If the second query was answered otherwise, I would say that the facts should be ascertained by evidence taken in the ordinary way on both sides, with professional assistance.

## CHIEF JUDGE OF COURTS OF MINES.

### OSBORNE AND OTHERS v. ELLIOT.

**S**PECIAL case stated by the Judge of the Courts of Mines at Sandhurst as follows:—

"The suit was by *Osborne* and seven other Plaintiffs to recover an encroachment and recover the value of abstracted gold. The Plaintiffs set out a mining lease from the Crown to *Osborne* for fifteen years, from 7th May, 1866; that by deed poll, 29th September, 1866, *Osborne* declared that he and the three other first-named Plaintiffs were entitled to the lease in equal fourth shares; that by agreement, dated 8th June, 1868, between the first four Plaintiffs of the one part, and the last four Plaintiffs of the other part, the last four Plaintiffs agreed to work the land in the lease on tribute; that the Defendant, who was occupier of adjoining land, had trespassed on the land in the lease and removed gold therefrom. By the agreement of 8th June, 1868, the last four Plaintiffs undertook to work the land for two years, finding labour and materials, and to pay to the first four Plaintiffs thirty per cent. of the gross yield of gold. It appeared that the encroachment complained of was first discovered in February, 1869, but the Plaintiffs were unable to prove whether it, or a part of it, had taken place before or after 8th June, 1868, on which date the tribute agreement was entered into. The Plaintiffs gave evidence to shew the value of stone abstracted. At the close of the Plaintiff's case, the Defendant's counsel applied for a nonsuit, on the ground that it appeared from the documents relied on in the plaintiff's case that the four first-named Plaintiffs were entitled to sue, the four last-named Plaintiffs were not, and *vice versa*; that it substantially sought alternative relief from two classes of Plaintiffs who could not properly be joined together as Co-Plaintiffs; that a relation resembling that of landlord and tenant appeared to exist between them at the commencement of the suit, and they could not be allowed to blow hot and cold. I held that I could rectify a misjoinder of Plaintiffs by virtue of section 130 of the Statute and order one or other class of Plaintiffs to be struck out, so as to accord with such evidence as might in the course of the hearing be given in reference to the time when the encroachment took place, and the asportation of stone actually took place. I intimated that I should either strike out one class of Plaintiffs or dismiss the suit. I meantime, I would assume that the time of the discovery was

was made for the tributers. On special case,

*Held*, that it was a case for amendment under section 130 of the Statute, right in deferring the discretion of the manner of amendment to the Court when discovered.

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OSBORNE.

v.

ELLIOT.

*Statement.*

" of encroachment till the contrary should appear, and that the four last-named Plaintiffs were entitled at that stage to have the misjoinder rectified if they thought proper. Evidence was then given for the Defendant, from which it appeared that the encroachment took place after the agreement for tribute was entered into—namely, in August, 1868. Counsel for Plaintiffs then applied to amend the plaint by striking out the names of the four first-named Plaintiffs, leaving the case as a suit by the tributers. I granted the application, and made an order accordingly, striking out the first four Plaintiffs, and made a decree for £235 3s. 5d. and taxed costs £68 10s. 6d. for the last four. The Defendant has appealed and the question submitted by me is—'Whether I was right in amending the plaint by striking out the names of the first four Plaintiffs, the lessees from the Crown, or whether I should have dismissed the suit on the ground of misjoinder?'"

*Argument.*

Mr. J. W. Stephen for the Appellant (Defendant). An amendment ought not to have been allowed which left the Defendant uncertain what case he had to meet. The amendment not having been made when the Court gave leave to amend at the close of the Plaintiffs' case, should not have been permitted afterwards. The misjoinder in this instance is not of the character contemplated by section 130. The four last-named Plaintiffs had no title, as their license gave them no interest in the land, but only permission to work on it. Their possession was that of the first four Plaintiffs, and the last four had no more right to sue for a trespass upon the land than a gardener or ploughman interrupted in working on his master's land would have to sue for a similar trespass. The action can only be brought by the persons entitled to possession. The license could not create any relation of landlord and tenant. If it purported to do so, it would be in violation of the covenants of the lease and the regulations under which it issued.

Mr. Martley for the Respondents (Plaintiffs).—The tributers were entitled to possession and to defend their possession. The license carries with it every power necessary to make it effectual. *Harker v. Birkbeck* (c) is a direct

(c) 1 W. Bl., 482.

## CHIEF JUDGE OF COURTS OF MINES.

authority for the licensees' right to sue. A wrong cannot impeach the validity of the licence and set *jus tertii*. Section 180 gives the widest discretion amending, and is even mandatory in providing misjoinder shall not vitiate proceedings.

Mr. J. W. Stephen in reply.

Cur. adv.

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MR. JUSTICE MOLESWORTH:—

This is an appeal from the learned Judge of the Court of Mines, Sandhurst. On the 7th May, 1866, a mining lease was granted by Her Majesty to Mr. Osborne of a piece of land for fifteen years. By deed-poll, September, 1866, *Osborne* declared that he and three others held each a fourth of the benefit of the deed. By agreement in writing, not under seal, 8th June, 1868, between *Osborne* and these three others of the one part, and Mr. *Arthur* and three others of the other part, it was agreed that the parties of the second part should work the leased land on tribute for two years on certain terms and provisions for determination and manner of working. The parties of the second part agreed to pay the parties of the first part, thirty per cent. of the gross yield of gold from the whole, from the language of this instrument, I say that it purported to be an exclusive licence to work the mines on the specified ground, which could not be granted effectually without deed. (The cases are collected: *Bridge on Mines*, 251.) The Defendant being in occupation of adjoining land trespassed by undermining the land in question, and taking gold. The eight parties to the deed of 8th June, 1868, joined in a plaint stating the above facts, praying an injunction, delivery of possession of the land, and payment of the value of the gold taken.

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 OSBOBNE  
 v.  
 ELLIOT.  
 —  
*Judgment.*

At the hearing of the case, it appeared that the encroachment was discovered in February last, but the Plaintiffs could not prove whether it in fact occurred before or after the 8th June, 1868. The Plaintiffs gave evidence of the value of the gold. The counsel for the Defendant then insisted that the Plaintiffs should be nonsuited; that if the four first Plaintiffs were entitled to sue, the four last were not, and *vice versa*; that the relation between the first and second four was that of landlord and tenant, and that they could not join, and that no amendment could be allowed under section 130. The learned judge held that it was a case for amendment under that section, and that the option of the manner of amendment might, and should be, postponed until the time of encroachment was fixed by evidence. The counsel for the Plaintiffs insisted that all eight were properly joined, and that the relation of the eight was that of co-partners. The learned judge adhered to his view, intimating that at that stage of evidence the encroachment should be deemed to be in February, 1869, and, therefore, that the last four Plaintiffs should succeed, and be retained. The Defendant then went into evidence, from which it appeared that the encroachment was about August, 1868, after the agreement, and the Plaintiffs' counsel elected to amend by striking out the four first Plaintiffs, and taking a decree for the last four for £235 3s. 5d. and costs.

The case is referred to me as if the question was, if the learned judge was right in amending, or should have dismissed for misjoinder. Passing for the present over the difficulty of the want of a seal to the agreement, 8th June, 1868, I think the relation of the two sets of Plaintiffs might, for the purposes of this suit, be called landlord and tenant. It was not at all like that of co-partners. The four last would get gold, by means causing no responsibility to the four first for expenses, would hold that gold as belonging to those four as against the rest of the world,



with the liability to give a portion of it to the first four. As to the remedy of injunction, I think the eight might join; as to account of value, not because the gold raised or unraised would never be their common property; but I think that it was a case for amendment under the large words of section 130. I decided *Oxley v. Little* under section 185, and in it the four complainants had such exactly parallel rights, that there was no reason to retain one rather than the other. I think also the judge was right in deferring the discretion of the manner of amendment until the facts were entirely discovered. I think that if the four last Plaintiffs were in actual possession of the mine, whether their title was good or bad as between them and the four first, they were entitled to recover damages from a common wrongdoer. Persons in possession of a mine for such an interest as the agreement of the 8th June, 1868, purported to give, might maintain trespass against an encroacher, (cases collected—*Saunders' Pleadings and Evidence*, 1128;) and a person in possession, whether under a good or bad title, may maintain trespass against a wrongdoer having no colour of title (cases collected, *id.* 1127). An authority for both positions, in its facts very like the present case, is *Harker v. Birkbeck*. The point decided in it was that the remedy was not an action on the case, but it was treated as a doubt as to the form of action, which for our discussion is immaterial. See *Thuricott v. Martin* (*f*), and also *Wild v. Holy* (*g*), which is also material as to the damages to be given to the last four Plaintiffs, being irrespective of the tribute. But this view has thrown me upon a difficulty. I have nothing before me to shew that the four last and now continuing Plaintiffs were in possession of the mine. I should ordinarily upon an appeal decide upon the point which the learned judge represented to present the only doubt, but I think it possible in this case, from the confusion in the form of the plaint and amendment, that the importance of the possession of these four Plaintiffs was overlooked,

(*f*) 3 Ex., 454.

(*g*) 9 M. & W., 672.

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 OSBOENE  
 v.  
 ELLIOT.  
 Judgment.

1869.  
**OSBOBNE**  
 v.  
**ELLIOT.**  
*Judgment.*

At the hearing of the case  
 ment was discovered  
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 8th June, 1868.  
 of the gold. That  
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 and vice  
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 could  
 or

as to dispute  
 on Thursday  
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 but costs of the  
 ing has caused  
 is.

require evidence to be taken.

*Decree affirmed.*

### RYAN AND OTHERS v. CALLAGHAN AND OTHERS.

notice of appeal from a Warden "to the Court of Mines to be holden on the ninth day of July next that is to say to the next Court of Mines at the sitting of such Court which next after the expiration of fifteen days from the making of the said decision shall be held at Jamieson," does not properly name the sittings of the Court at which it is intended the appeal shall be heard.

**S**PECIAL case stated by the Judge of the Court of Mines at Beechworth, on an appeal to him from the decision of a Warden. The sufficiency of the notice of appeal was objected to, and, being in doubt as to the validity of the objections, he postponed the appeal till the next sittings, and submitted the following questions to the Chief Judge:—1. Does the notice of appeal properly name the sitting of the Court at which it was intended the appeal should be heard? 2. Is it sufficient that the notice of appeal is signed by the attorney for and on behalf of the Appellants and not by the Appellants themselves? The notice of appeal so far as material to the questions was as follows:—

"Take notice that *Denis Ryan, Thomas Whelan, Martin Ryan, and John Cumming*, being desirous of appealing from the decision of

A notice of appeal, headed "Take notice that *D.R., T.W., M.R., and J.C.*, being desirous of appealing" &c., and concluding "Yours, &c., *F.C.*, attorney for and on behalf of the Appellants above-named," is insufficient, the Appellants' names not appearing at the bottom of the notice. Such names need not inflexibly be in the Appellants' own writing, but it is convenient that they should be.

"Mr. Warden *Akskurst*, made in a proceeding before him on the 7th day of April, 1869, at Alexandra, in the Goulburn division of the mining district of Beechworth, and in which they were Complainants, and you, the said *Thomas Callaghan* and *William Callaghan*, were Defendants, \* \* \* intend to appeal to the Court of Mines to be holden at Jamieson on the 9th day of July next—that is to say to the next Court of Mines of the mining district of Beechworth, at the sitting of such Court which next after the expiration of fifteen days from the making of the said decision shall be held at Jamieson—against such decision." The notice set out the grounds of appeal, and concluded, "Yours, &c., FRED. COSTER, Attorney for and on behalf of the Appellants above-named."

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RYAN  
v.  
CALLAGHAN.  
—  
Statement.

The day for the next sittings of the Court of Mines had not been fixed when the notice was given, nor was it announced until the 11th June following, when a notice appeared fixing the sitting for the 10th July then next. The General Sessions had in the previous December been fixed to sit on the 9th July, and the day for appeal was fixed for the 9th, as the Court of Mines usually sat about the same time as the General Sessions were held.

Mr. *Bunny* for the Appellants. The notice substantially complies with the requirements of section 213. If the day for the sittings of the Court is not fixed when the notice of appeal is given, it is impossible to follow the schedule by naming the day, and it is enough to name the next sittings. *Flinn v. Kilgour* (h). The mistake as to the date is corrected by the words "that is to say." The day is mentioned as that upon which the appeal will probably be heard, but is clearly conditional upon the sittings being then held. It is not pretended that the Respondents, who appeared to object, were in any way misled by the error as to the date. It is not necessary that the Appellants should themselves subscribe the notice: all that is necessary is that their names should appear. The signature may be by an agent. *Frayne v. Carr* (j); *Flinn v. Kilgour*. Here the names appear at the heading

Argument.  
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(h) Ch. Ct. of M., 15th June, 1868. *Ante*, Vol. V., M.

(j) Ch. Ct. of M., 16th March, 1868, *Ante*, Vol. V., M.

1869.  
 RYAN.  
 v.  
 CALLAGHAN.  
 —  
*Argument.*

of the notice, and the agent signs on behalf of the Appellants above named. It was unnecessary to write the names over again at the foot. Signing on behalf of all is equivalent to signing in the names of all.

Mr. J. W. Stephen for the Respondents. A mistake in stating the date of the decision appealed against in notice of appeal will invalidate the notice, although the mistake is corrected by the decision being fully set out with the correct date. *Flinn v. Kilgour*. In the present case it was unnecessary for the Appellants to have fixed any date for the appeal, but, having taken upon themselves to do so, they are bound by the date fixed. The Appellants' attorney does not purport to sign for them. The notice is not by the Appellants, as required by the Act, but by an attorney personally as on their behalf. It is not their notice, but his. The Act requires the Appellants to give notice themselves, though an agent may sign for them.

Mr. Bunny in reply.

*Cur. adv. vult.*

September 16. MR. JUSTICE MOLESWORTH:—

*Judgment.*

This is a special case from the learned Judge of the Court of Mines, Jamieson. *Ryan* and others sued *Callaghan* and another in the Warden's Court, Alexandra, and were defeated. They sought to appeal to the District Court of Mines, and I have to deal with objections to the form of notice of appeal, which was not conformable to the 29th schedule of the "*Mining Act*" in the following points:— Instead of being in the first person—"We, the undersigned," &c., with the names at the bottom—it was "Take notice that *Denis Ryan*," &c., with the name of an attorney at bottom, described as "attorney for and on behalf of the above Appellants." Further, instead of stating the day

## CHIEF JUDGE OF COURTS OF MINES

for the hearing of the appeal, it ran, "on the 9th of July next—that is to say, to the next Court of the mining district of Beechworth, at the sitting of such Court which next after the expiration of fifteen days from the making of the said decision shall be held at Jamieson." At the time of the appeal, the General Sessions at Jamieson had been fixed for the 9th of July. The sittings of the Court of Mines had not been fixed, but they usually are about the same time. They were afterwards fixed for 10th July. The statute, section 212, requires the notice to state the time of hearing the appeal. In *Flinn v. Kilgour*, I held that when the sittings of the Court were not fixed, the notice might be as for the Court which, after the expiration of fifteen days, &c. there no day was named; here a wrong day, the 9th, is named, and absolutely, not as conjectural or so as to be qualified by the subsequent "that is to say." Persons used to legal proceedings, or knowing the facts about the sittings, might understand the subsequent words as qualifying "the 9th," but these forms are intended to give simple, unmistakeable information to the professional people, and the form here used might not be. As to the first-mentioned objection, the statute directs the form schedule 29 to be used, but I have some slight deviation from it allowable, and have done so in *Frayne v. Carr*, and *Flinn v. Kilgour*, that the names of the Appellants at the bottom of the notice need not inflexibly be in their own writing; but I think it is convenient that they should be. Here the names of the Appellants at the commencement, not the bottom of the notice, in this form, if generally adopted, would make the notice wrong by deputy, general. I therefore adhere to the form in the schedule, and answer—1. The notice of appeal must properly name the sittings of the Court at which the appeal intended the appeal should be heard. 2. It is sufficient that the notice of appeal is signed by the Appellants, or by their attorney "for and on behalf of the Appellants," but the names of the Appellants should appear at the bottom.

1869.

November 16.  
December 1.

Appeals from Wardens to the District Courts of Mines should be practically rehearings; and an Appellant is entitled to prove another and different case to that proved before the Warden; but he should be confined to the grounds stated in his notice of appeal, subject to the relaxation of No. 291, sec. 216.

## CONSTABLE v. SMITH.

**S**PECIAL case stated by the Judge of the Court of Mines at Stawell

*Constable* was summoned before the Warden for injuring a race belonging to the Respondents, and a decision was given against him. He appealed to the Court of Mines on the following grounds:—

“First.—That said decision is erroneous in point of law, and against the evidence given on the hearing of said suit, and not warranted by the facts of the case. Second.—That the title of Appellants to said race, the subject of the suit in Warden’s court, is long previous to the title sought to be put up by the said Respondents, the Complainants in Warden’s court. Third.—That said race was cut and constituted by Appellant at his own expense for mining purposes, and held by him under, and by virtue of, the ‘Mining Statute 1865,’ and of his miner’s right, in force previous to and on the 29th day of March, 1869, being the day named in the Warden’s summons, and alleged in same that Appellant unlawfully interfered with said race. Fourth.—That on the hearing of said suit before the Warden it was objected on the part of Appellant, the Defendant in said suit, that there was a misjoinder of parties to said suit namely, ‘The Scotchman’s Reef Quartz Crushing Company Registered,’ of Pleasant Creek, but the said Warden refused to strike out the name of said company from said summons. Fifth.—That on the hearing of said suit before the said Warden, the said Respondents, the Complainants in said Warden’s court, namely, *Francis Smith* and *Matthew Dalkin*, failed to prove any title to said race, nor did they, the other Complainants, namely, ‘The Scotchman’s Reef Quartz Crushing Company Registered,’ of Pleasant Creek, attempt to prove any title thereto.”

On the hearing of the appeal, the Judge of the Court of Mines reserved the following case:—

“This was an appeal from the decision of a Warden, made on 21st May, 1869. The appeal came on for hearing at Stawell on 3rd July last, when Mr. *M'Dermott*, counsel for Respondents, contended that Appellant should confine himself to those grounds of appeal that were raised before the Warden, and, as alleged, improperly decided by him;

## CHIEF JUDGE OF COURTS OF MINES

“that the first ground of appeal was not a ground of appeal within the meaning of the Act, not setting forth any particular objection to the decision of the Warden, but merely saying in general terms that the Warden was wrong; that the second, third, and fifth grounds of appeal were not raised before the Warden, and therefore were not decided by him; and that it could not be an appeal against his decision when he had not decided upon the particular questions set forth in those grounds of appeal. Mr. *Trench*, for the Appellants, contended that the appeal was in the nature of a rehearing, and that the Appellant was not confined to the case proved before the Warden. He could state any grounds of appeal, although none of them were decided before the Warden and decided by him. The question is, in the opinion of the Chief Judge of the Court of Mines, the Appellant is entitled to a rehearing, to the extent of being allowed to prove another and different case to that proved before the Warden, or whether he is to be confined to the case proved before the Warden in support of his complaint, and to the grounds of his appeal against the decision of the Warden, such grounds of appeal being the particular grounds raised before the Warden and decided by him.”

Mr. *Trench* for the Appellant.

Mr. *M'Dermott* for the Respondents.

Cur. ad

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MR. JUSTICE MOLESWORTH :—

In this case *Smith* and others sued *Constable* the Warden, who decided in favour of the Complainant. *Constable* appealed to the learned judge of the Court of Mines. On the opening of the Appellant's case, the Respondent insisted that some of the grounds of appeal urged, were on points not raised before the Warden. The learned judge has sent me a special inquiry inquiring whether the Appellant is entitled to a rehearing to the extent of being allowed to prove another and different case to that proved before the Warden, or whether he is to be confined to the case proved before the Warden in support of his complaint, and to the grounds of his appeal against the decision of the Warden, such grounds of appeal being the particular grounds raised before the Warden and decided by him.

1869.  
 CONSTABLE  
 v.  
 SMITH.  
 —  
*Judgment.*

The "*Mining Statute 1865*," No. 291, sec. 172, in providing for appeals from the District Judges to the Chief Judge, provides for the facts being collected and stated in a special case settled by the parties; or, if they disagree, by the District Judge; and this stands in place of a transmission of evidence; but in the case of appeals from Wardens to the District Mining Judges, there is no such provision. Further, as to proceedings before Wardens, there is little of pleadings for Complainant, shewing the case made by him; none for the Defendant; no provision for reducing the evidence to writing; none for any record shewing the grounds of the Warden's decision. The case may be heard both before the Warden and on appeal before assessors. It seems to me hardly possible, with such defective means of knowing matters before the Warden, to limit those conducting the cases of either party to the course pursued before him. If new evidence cannot be received, at every step a question might be raised whether that offered was offered before the Warden; and so as to every legal argument, and there would often be more difficulty in deciding what was done or said before the Warden, than in originally disposing of the case upon the merits.

There are some cases as to appeals from magistrates, &c., in which the parties appealing have been precluded from raising new questions, such as *Corio Road Board v. Galletly* (k), and *Regina v. O'Brien* (l); but they were cases in which the Court might learn the facts by affidavit shewing what was done below. Some cases, refusing new points, may rest on the ground that the conduct of the party was a waiver of the right to object, so that it could not be taken in the court below; that the Appellant took his chance of the trial below resulting in his favour, without disclosing an objection, say, to the jurisdiction; that if the objection had been taken below it might have been cured. There

(k) *Ante* Vol. I., L., 85.

(l) *Ante* Vol. III., L., 54.



are cases against such confinement to Appellants, as *Stinson v. Browning* (m), *Buggin v. Bennett* (n), *The King v. Commissioners of Excise* (o), and other cases, collected in 1 *Burns' Justice*, 167, which shews that the word "appeal" does not exclude new matter. I rather think that persons who do not appear before the Warden may appeal. The Warden's is intended to be a court of quick action between parties often unrepresented by counsel or attorneys, yet dealing with cases involving the rights to property of large value, and, as I expressed an opinion in *Mulcahay v. Walhalla Company* (p), binding the rights.

1869.  
 CONSTABLE  
 v.  
 SMITH.  
 Judgment.

As to saying that it is unjust to Wardens to reverse their decisions upon grounds which they were not called upon to consider, those who know that the material is changed will know that their opinion is not overruled. As to the danger of parties holding back their true cases before Wardens, and making the district, in fact, the primary judge, the power of dealing with costs will check it; the power of adjournment will prevent the inconvenience of surprise. I think that appeals from the Wardens under the "*Mining Statute*" should be practically rehearings. The second question has a mistake—using the word "complaint."

I answer:—The Appellant is entitled to a rehearing to the extent of being allowed to prove another and different case to that proved before the Warden. (2) He is confined to the grounds stated in his notice of appeal, subject to the relaxation of section 216.

(m) 35 L. J., M. C., 152.

(n) 4 Burr., 2035.

(o) 8 M. & S., 133.

(p) Sup. Ct., Vic., 12th April,  
 1868, *Ante* Vol. V., Eq.

1869.

November 16.  
December 1.

BRABENDER v. GIBBS.

A certificate of registration of suspension, under sec. 76 of the Maryborough by-laws of 17th September, 1866, issued on a verbal application only, is ineffectual as an excuse for not working a claim.

**S**PECIAL case stated by the Warden at Avoca as follows:—

“ This case was heard before me at Avoca, in the Maryborough mining district, on the 15th October, 1869. In the course of the hearing, the Defendant produced a certificate under the hand of the mining-registrar, exempting ground said to be held by him, from the operation of the by-laws imposing forfeiture for non-working of the claims for a period of six months from the 1st of April, 1869; and on producing the said certificate he stated that he merely applied to the mining-registrar for the same verbally, and not in writing, as required by section 76 of the Maryborough by-laws of 17th September, 1866, which is the only section under which such a certificate could be granted. For the Complainants it was contended that the power of the registrar to give such a certificate was conditional on the application for the same being in writing, and that any such certificate, granted on a merely verbal application, was utterly worthless, and could never acquire any existence in law; and it was in point of law no certificate of exemption at all, wholly void, and not simply voidable.” The question reserved was—“ Is a certificate of exemption, under said section 76 of said by-laws, granted by the mining-registrar on a merely verbal application for the same, absolutely void, or only voidable?”

Mr. *Atkins* for the Defendant.

No appearance for the Complainants.

*Cur. adv. vult.*

December 1. MR. JUSTICE MOLESWORTH:—

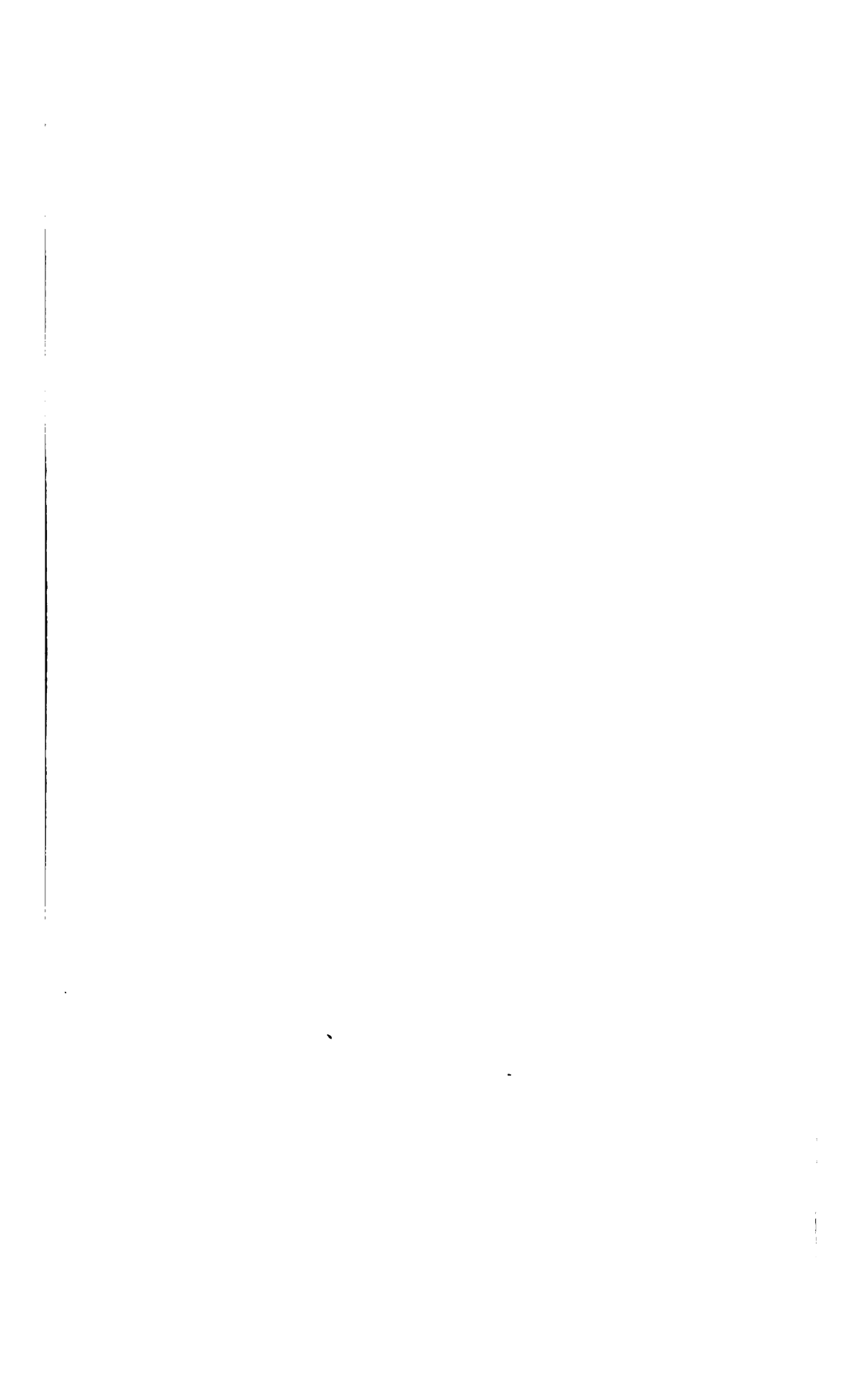
*Judgment.*

This is a special case from the Warden, Avoca. I collect that the Complainants were endeavouring to enforce a forfeiture or liability by the Defendant neglecting to work a claim, and that the Defendant sought to protect himself by having registered a suspension, under Maryborough

by-law, 17th September, 1866, No. 76, his certificate of registration having been obtained from the registrar upon a verbal, not written, application. The form in which the question is put to me is, whether the certificate was void or voidable, which would be right if there were any proceeding to set aside a registration of suspension; and the question was, if it should be resorted to before the plaintiff. But there is none such. The question, I apprehend, should be if the suspension certificate is an effectual protection from the forfeiture, and that depends upon whether the provision for the application being in writing was obligatory or directory. I have doubted whether the written request was intended mainly for the assistance and protection of the registrar, and which, therefore, he might dispense with as for the protection of the interests of the mining public. There might be many purposes for which writing would afford material evidence against the applicant. Besides, the by-laws make no express provision for the registrar keeping any index of suspensions, so that persons inquiring at his office might find no means there of ascertaining the ground upon which the suspension was sought, or its truth, falsehood, or date, but the written application. Its existence, therefore, might be of public importance, and the provision is, I think, but with doubt, obligatory.

I answer, that the certificate issued under the said 76th section, being only verbally applied for, was ineffectual as an excuse for not working a claim.

1869.  
BRABENDER  
v.  
GIBBS.  
—  
*Judgment.*



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- ADMISSIONS.—May be used as evidence though not pleaded E. 240  
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- AMENDMENT.—*In Court of Mines.*] Lessees and their tributers, joined as Plaintiffs in an encroachment suit. The Defendant applied for a non-suit on the ground of misjoinder, as either the lessees or the tributers, must be solely entitled to redress, and it did not appear which. The District Judge held that he could rectify the misjoinder under No. 291, sec. 130, by striking out either class of Plaintiffs, according to the evidence. The Defendant then gave evidence which shewed that the encroachment was after the letting on tribute, and on the Plaintiffs' application, the plaint was amended by striking out the lessees as Plaintiffs, and a decree was made for the tributers. On special case:—*Held*, that it was a case for amendment under section 130, and that the Judge was right in deferring the discretion of the manner of amendment, until the facts were discovered.  
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 HARRISON *v.* SMITH . . . . . E. 183



8. APPEAL.—*From Court of Mines—Judge to state case.*] The Judge of the Court for the time being, is the proper person to state a case under the Act No. 291, sec. 172, although he may not be the Judge who made the order appealed from.  
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4. ——— *From Court of Mines—Not in time.*] Where, on the face of an appeal case, it appeared that the appeal was not in time, and the case did not shew any order to enlarge the time, the Court refused to hear the appeal, without requiring a special application to set aside the setting down.  
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5. ——— *From Warden—Notice of.*] A notice of appeal from a Warden "to the Court of Mines to be holden on the 9th day of July next that is to say to the next Court of Mines at the sitting of such Court which next after the expiration of fifteen days from the making of the said decision shall be held at Jamieson," does not properly name the sittings of the Court at which it is intended the appeal shall be heard.  
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6. ——— *From Warden—Notice of—Signature.*] A notice of appeal, headed "Take notice that D. E., T. W., M. R., and J. C., being desirous of appealing," &c., and concluding "Yours, &c., F. C., attorney for and on behalf of the Appellants above-named," is insufficient, the Appellants' names not appearing at the bottom of the notice. Such names need not inflexibly be in the Appellants' own writing, but it is convenient that they should be.  
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7. ——— *From Warden—Practically a re-hearing.*] Appeals from Wardens to the District Courts of Mines should be practically rehearings; and an Appellant is entitled to prove another and different case to that proved before the Warden; but he should be confined to the grounds stated in his notice of appeal, subject to the relaxation of No. 291, sec. 216.  
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8. ——— *From Warden—Production of certificate of Warden's decision.*] Upon the hearing of an appeal from a Warden, the original register, signed by the Warden, cannot be used to shew his decision and order, the Act No. 291. sec. 213, requiring a certified copy to be produced; but, upon the accidental non-production of the Warden's certificate, the Court may either proceed to hear the case, and receive the certificate at any time before the decision, or adjourn the hearing upon fair terms.  
WHITEMAN v. MCGALLAN . . . . . M. 28
9. ——— *From Warden—Representation of co-Respondents.*] The question whether a person served with notice of appeal from a Warden under No. 291, sec. 212, sufficiently repre-

sents all the Respondents, is a matter for the discretion of the Judge of the Court of Mines.

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10. APPEAL.—*From Warden—Service—Evidence of.*] Respondents, on appeal, have a right to object to defective service upon themselves or others; and to cross-examine, or give evidence upon controverted facts as to service.  
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12. ——— *From Warden—Service on Attorney.*] The power of an attorney in a Warden’s Court ceases upon the decision, so that he does not represent his client to receive notice of appeal.  
MURPHY v. NEIL . . . . . M. 45
13. ——— *From Warden—Service on Warden.*] If an Appellant from a Warden is unable to find sufficient parties to serve, he should, within the three days fixed by the Act, serve the Warden; and *semble*, that service at his residence or upon his clerk at his office would be sufficient.  
WHITEMAN v. MCGALLAN . . . . . M. 28
14. ——— *From Warden—Service—Waiver.*] Service upon the Appellant by an attorney, as on behalf of the Respondent, of a notice to produce a document at the hearing of the appeal, is not a waiver of any objection to the service of the notice of appeal.  
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15. ——— *To full Court—Deposit.*] The full Court has no jurisdiction to entertain an appeal from the primary Judge unless the £50 deposit be lodged by the Appellant, even though he be suing in *formâ pauperis*.  
MERRY v. HAWTHORNE . . . . . E. 329
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17. ——— *To full Court—From Order in Chambers.*] An appeal under 19 Vic., No. 13, sec. 5, lies to the full Court from the Order of a Judge made in Chambers on summons, by way of appeal from the Chief Commissioner of Insolvency’s rejection of proof of debt.  
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19. APPEAL: To General Sessions . . . . . L. 109  
*See* BOARD OF HEALTH.
20. ——— *To Privy Council—Appealable amount.*] *Semle*, that in a suit to restrain a mining trespass, and for an account of gold removed, where no account has as yet been directed, the fact that if such account be directed at the hearing the matters then in issue will involve claims respecting property to the value of £1000, will not, as to appealable amount, authorise an appeal to the Privy Council.  
 ATTORNEY-GENERAL *v.* PRINCE OF WALES COMPANY  
 REGISTERED . . . . . E. 4
21. ——— *To Privy Council—Appealable amount.*] The incidental effect of a decree upon other property of the unsuccessful litigant, not directly affected by the suit, cannot be considered in order to make up the appealable amount to entitle him to appeal to the Privy Council.  
 WAKEFIELD *v.* PARKER . . . . . E. 322
22. ——— *To Privy Council—From injunction motion.*] Motion for leave to appeal to Privy Council from order refusing motion for injunction, refused with costs.  
 THE MELBOURNE AND HOBSON'S BAY UNITED RAILWAY COMPANY *v.* THE MAYOR, &C., OF THE BOROUGH OF PRAHRAN . . . . . E. 228
23. ——— *To Privy Council—From injunction motion.*] Leave to appeal to the Privy Council from an order for an interlocutory injunction, refused.  
 DAVIS *v.* THE QUEEN . . . . . E. 106
24. ——— *To Privy Council—Merits concluded.*] A judgment overruling a plea in equity, does not conclude the merits of the case, within the meaning of 15 *Vic.*, No. 10, sec. 33, so as to entitle the unsuccessful party to obtain leave to appeal to the Privy Council.  
 ATTORNEY-GENERAL *v.* PRINCE OF WALES COMPANY  
 REGISTERED . . . . . E. 4
25. ——— *To Privy Council—Time for application for leave.*] Where a summons for leave to appeal to the Privy Council had been taken out for a day within the thirty days allowed by 15 *Vic.*, No. 10, sec. 33, and had on that day been adjourned by the Judge to a day without the thirty days:—*Held*, that the application for leave to appeal, having been originally made within the thirty days, was sufficient.  
 ATTORNEY-GENERAL *v.* PRINCE OF WALES COMPANY  
 REGISTERED . . . . . E. 4
- ARBITRATION.—*Appointment of Umpire condition precedent.*] A contract for purchase of stock-in-trade at a valuation, provided for the appointment of valuers, who before commencing their valuation, were to appoint an umpire. The valuers commenced their valuation without appointing an umpire:—*Held*, that the appointment of the umpire was a condition precedent to the valuation; that the

- original agreement fell through from non-compliance of the valuator with the condition precedent, and, that the purchaser was entitled to recover his deposit paid under the contract. PAGE
- FINN v. RAY. . . . . L. 18
- ASSAULT.—*Verdict bad.*] Verdict of assault, on an information charging having feloniously caused grievous bodily harm, bad . . . . . L. 237  
*See PRACTICE, CRIMINAL.* 2.
- ASSESSMENT.—*Municipal—Appeal.*] Person aggrieved . . L. 168  
*See RATE.* 2.
- ATTACHMENT.—*For costs—Discharge of co-Defendant—Release.*] Five Defendants were imprisoned for contempt in not paying joint costs. Three were discharged on payment of their proportion of the original costs, and the costs of their contempt:—*Held*, that such discharge did not release them, or the remaining two, from the balance of costs due; and that the remaining two were only entitled to their discharge on payment of such balance, and the costs of their contempt.
- ATTORNEY GENERAL v. BENTLEY. . . . . E. 175
2. ———— *Place of detention.*] Defendants arrested under an attachment for contempt should, wherever arrested, be turned over to the custody of the keeper of H.M. gaol in Melbourne.
- ATTORNEY GENERAL v. BENTLEY. . . . . E. 175
8. ———— For costs of Ecclesiastical Suit . . . I. E. M. 41  
*See PRACTICE, ECCLESIASTICAL.* 4.
- ATTORNEY.—In Warden's Court does not represent client to receive notice of appeal. . . . . M. 45  
*See APPEAL.* 12.
2. ———— *Privilege—Professional confidence.*] Papers of a testator, shewing right of his executors as a class, against one of the executors individually, placed by such one executor in the hands of the solicitor to the executors, may, without breach of professional confidence, be produced by such solicitor as evidence for the Plaintiffs, in a suit by the other executors against the one who placed the papers in the solicitor's hands.
- BRUCE v. LIGAR . . . . . E. 240
8. ———— Of Corporate Plaintiff—Proof of Retainer . . L. 216  
*See PRACTICE AT LAW.* 2.
- BAILIFF, SPECIAL: Appointment of . . . . . L. 98  
*See CERTIFICATE OF TITLE.*
- BANK.—*Investment of Funds—Non-violation of Act of Incorporation—Authority of Manager—Corporate seal—Constructive trust.*] E. deposited with the Bank of Victoria

scrip for 550 shares in the Golden Gate Gold-Mining Company, as security for moneys then due by him to the bank. Subsequently *E.* executed a statutory creditors' deed. The company applied for a lease of its claim, and stopped working, by which its claim became liable to forfeiture. *S.*, a previous director, resigned his directorship, and immediately instituted proceedings before a Warden for the forfeiture of the claim. The Warden dismissed the case, and *S.* gave notice of appeal. Pending the appeal, *S.* agreed to withdraw his proceedings in consideration of the bank giving an undertaking to meet the liabilities on *E.*'s shares as long as they held them as security. *E.*'s trustees, by arrangement with the bank, sold *E.*'s shares by auction, which were purchased (11th June) for the bank, in the name of *H.* and others, its nominees. The bank manager (14th June) wrote to the manager of the company, undertaking to see all calls paid. This was first communicated to *S.* on 11th July. *S.* repudiated the bank manager's letter as not binding on the bank, and prosecuted his appeal. On the 26th June *S.* wrote, consenting to an amalgamation of the Golden Gate Company with another company, and undertaking, in the event of his appeal being successful, to convey to all the shareholders in the Golden Gate Company, other than *E.*, or those claiming through him, shares equal to those previously held by them. Pending the ultimate decision of the appeal, *S.* wrote to the company's solicitor in effect that he held himself bound by this undertaking if successful on the appeal, not if the company continued to litigate actively with him. The appeal was therefore heard unopposed, and *S.* succeeded. The two companies were then amalgamated, and *S.* distributed the shares according to his letter of the 26th June, but excluding the bank, and retaining to himself the shares in the amalgamated company representing *E.*'s 550 shares. On bill by the bank and its nominees into whose names *E.*'s shares had been transferred, against *S.*:—*Held*, by the full Court affirming *Molesworth, J.*, that the bank and its nominees were properly joined as co-Plaintiffs: but reversing *Molesworth, J.*, (1) That the purchase of the shares by the bank under the circumstances, was not a violation of its Act of Incorporation, as investing its funds in a trading or mercantile speculation, not within the ordinary and legitimate purposes and operations of banking establishments: (2) That the undertaking of the 11th June was within the scope of the authority of the bank manager, and did not require the corporate seal: (3) That the forfeiture and bargain for the amalgamation had been brought about by unfair means as against the bank, and that the Defendant was a trustee for the bank, of the shares in the amalgamated company, representing *E.*'s 550 shares in the Golden Gate Company.

**BANKER AND CUSTOMER.—Presentment for acceptance—**

Notice of dishonor . . . . . L. 178

*See BILL OF EXCHANGE. 3.*

**BILL OF EXCHANGE.—Cancellation of acceptance.]** If a drawee has written his name on a bill with the intention to accept, he is at liberty to cancel the acceptance before the bill is delivered; or *semble*, before the fact of acceptance is communicated to the holder.

**BANK OF VAN DIEMAN'S LAND v. BANK OF VICTORIA L. 178**2. **Notice of dishonor—Due diligence.]**

A bill was dishonoured in Melbourne on a Monday. Notice of dishonour was sent to the drawer in Launceston, Tasmania, by a mail leaving Melbourne on the Tuesday. A mail had left Melbourne for Launceston on the Monday evening, but letters by Tuesday's mail were delivered in Launceston as soon as those by Monday's mail:—*Held*, that due diligence had not been used in giving notice of dishonour.

**BANK OF VAN DIEMAN'S LAND v. BANK OF VICTORIA L. 178**8. **Presentment for acceptance.]**

A bill of exchange must be presented for acceptance within a reasonable time of its receipt by the holder, which is a mixed question of law and fact. It need not be sent for acceptance by the very earliest opportunity, though it must be sent without improper delay. In presenting foreign bills of exchange for acceptance, reasonable diligence is used if done on the day after receipt of the bill. A bank received from a customer, for presentment and collection, a foreign bill of exchange on Friday, and left it with the drawees for acceptance on the same day:—*Held*, that the bank need not have presented the bill for acceptance before Saturday, and would then have had till Monday to obtain the acceptance, or the refusal of the drawee to accept, and that the circumstance of having presented the bill on Friday did not compel the Bank to obtain an answer on Saturday.

**BANK OF VAN DIEMAN'S LAND v. BANK OF VICTORIA L. 178**

**BILL OF SALE.—Registration of.]** Affidavit, verifying the residence and occupation of the attesting witness to a bill of sale, as follows, "I reside at Geelong, and am a law clerk," held sufficient under the Act No. 204, sec. 56.

**DOUGLASS v. SIMPSON . . . . . E. 32****BOARD OF HEALTH.—Land compulsorily taken for drain—Compensation—Appeal to General Sessions—Costs—Certiorari.]**

A Local Board of Health appealed under No. 310, sec. 48, to General Sessions, to fix the amount of compensation to be paid to the owners of land through which it was proposed to make a drain. The General Sessions considering that the drain was unnecessary, made an order dismissing the appeal with costs, "subject to special case," but no special case was stated. On rule *nisi* for *certiorari* to quash this order:—*Held*, that the order was invalid; that in appeals

under No. 310, sec. 48, the General Sessions has no power to give costs; that the General Sessions could not enquire into the necessity for the work, but only into the amount of compensation; and rule made absolute:—*Semble*, the paying of the compensation is a condition precedent to entering upon the land.

REGINA *v.* POLHMAN . . . . . L. 109

**BOROUGH COUNCIL.**—*Prospective Contracts—Estimate.*]

Where prospective contracts, involving outlay in future years, are proposed by a Municipal Corporation, the necessary funds should be provided by means of a special rate; otherwise, the outlay of the year should not go beyond the income of the year. Where the Council of a Borough proposed to enter into a contract, by which it appeared that they must be either incurring a prospective liability, and that not by means of a special rate, or running themselves into debt as for the current year, injunction granted restraining them from entering into such contract:—*Quere*, how far a Borough Council is concluded by an estimate made under the Act No. 184, sec. 186.

THE ATTORNEY GENERAL *v.* THE MAYOR, COUNCIL-  
LORS, AND BURGESSES OF THE BOROUGH OF ST.

KILDA . . . . . E. 141

CA SA: Issue of . . . . . L. 144  
*See* PRACTICE AT LAW. 9.

CALLS.—Recovery of by Official Agent . . . . . L. 85  
*See* MINING SHARES.

CANCELLATION: Of acceptance . . . . . L. 178  
*See* BILL OF EXCHANGE. 1.

CANDIDATE: At Municipal Election—Signature of Nomin-  
ation Paper . . . . . L. 221  
*See* SIGNATURE.

CARRIER.—*Lien of.*] A carrier has no lien for carriage of  
goods given to him, without the privity or consent of the  
true owner, for the purpose of being carried.

GOLDSBROUGH *v.* McCULLOCH . . . . . L. 113

CATTLE: Stray, Distress . . . . . L. 227  
*See* DISTRESS.

CERTIFICATE.—*Insolvent's.*] Refusal of, for fraudulent pre-  
ference . . . . . I. E. & M. 7  
*See* FRAUDULENT PREFERENCE. 1.

2. ————— *Of registration of suspension of working a  
claim.*] A certificate of registration of suspension under  
sec. 76 of the Maryborough by-laws of the 17th September,  
1866, issued on a verbal application only, is ineffectual as  
an excuse for not working a claim.

BRABENDER *v.* GIBBS . . . . . M 62

3. **CERTIFICATE.**—*Of Warden's decision.*] A certificate "that the above is a true copy of the minute of my decision," signed by a warden, is insufficient under No. 291, sec. 213, as the certificate must go to the warden's order as well as his decision.

WHITEMAN v. MCGALLAN . . . . . M. 28

4. ——— Production of, on appeal . . . . . M. 28  
See APPEAL. 8.

**CERTIFICATE OF TITLE.**—In an action of trespass for breaking and entering the leasehold close of the Plaintiffs' at St. Arnaud, the title of the Plaintiffs was based on (1) A certificate of title under the "*Transfer of Land Statute*," that they were lessees of the Crown for thirty years; and (2) A sale by a special bailiff appointed by a Judge of the Supreme Court on the application of a judgment creditor of the prior lessee:—*Held* (1) That the Plaintiffs could recover on the certificate of title alone; (2) That the special bailiff was well appointed, St. Arnaud being more than 100 miles from Melbourne, although less than that from a circuit town.

HOUSE v. O'FARRELL . . . . . L. 98

**CERTIORARI.**—A decree made by the Judge of the Court of Mines at Ballarat, was varied on appeal by the Chief Judge of Courts of Mines. Subsequently the decree was quashed by *certiorari*, but not the order varying it. The Judge of the Court of Mines declined to proceed further with the case, on the ground that the order of the Chief Judge was final, and had not been quashed:—*Held*, that the decree having been quashed, the order varying it fell with it, and *mandamus* granted to the Judge of the Court of Mines to hear the cause.

REGINA v. ROGERS . . . . . L. 138

2. ——— Application for, to Judge in Chambers L. 209, 240  
See PRACTICE AT LAW. 3, 4.

3. ——— Conviction bad, for excess of jurisdiction may be brought up by, though *certiorari* taken away by Statute . . . . . L. 26  
See CONVICTION.

4. ——— To quash order of General Sessions . . . L. 109  
See BOARD OF HEALTH.

**CHAMPERTY.**—A suit was instituted by nine Plaintiffs against Defendants, alleged to be in illegal occupation of mining land. The Plaintiffs had no title but their miners' rights. It appeared in evidence that the Plaintiffs' solicitor had paid the expenses of the suit, and was to have half of each of the Plaintiff's interest in the land when recovered. The Judge of the District Court of Mines dismissed the suit, with costs, as tainted with champerty and maintenance. On appeal:—*Held*, that the claim was in its inception and concoction, based upon champerty and maintenance, and appeal dis-



missed, with costs. It is not necessary to constitute champerty, that there should be a binding contract between the parties, which, apart from its illegality, would be valid. *Semble*, that when a Plaintiff has originally a good title, he is not to be defeated on the ground of the mode of remunerating the attorney whom he employs.

COLLINS *v.* HAYES . . . . . M. 5

CHEQUE.—*Crossed.*] Parallel lines added to a cheque payable to bearer, and rendering it a crossed cheque, are not, according to the legislation in force in Victoria, a material part of the cheque. *Williams, J.*, dissentiente.

GOLDEN LAKE MINING COMPANY *v.* WOOD . . . L. 170

CLAIM.—*Mining.*] A claim may be occupied under No. 29 of the Gipps' Land by-laws, which includes in its area other lands than those the subject of a Warden's declaration of abandonment under by-law 17, although such other lands have not been previously occupied by the Defendants in the summons under by-law 17; but if the claim be of the dimensions which can be taken only in worked and abandoned ground, it must, to be supported, be all in some way of that description:—*Held*, in the particular instance, that Defendants might give up the untried ground, part of their claim, improperly taken, and defend as to the part properly taken under the Warden's order.

BRYSON *v.* MCCARTHY . . . . . M. 35

2. ——— *Mining—Frontage—Discovery of lead.*] Provisional claim-holders of frontage claims under the Beechworth by-laws are bound to call upon the mining surveyor of the division to act under by-law 19, when the lead is discovered, and his office is within ten miles of the claim; but where it is not within ten miles, although the provisional claim-holders are not bound to apply, any person interested is entitled to call upon the surveyor to mark off substituted claims, and he should do so along a straight line to avoid overlapping, and taking measures to inform the provisional claim-holders of what he is doing; and as soon as he so lays off the substituted claims, the successive claim-holders, not working, become liable to penalties.

ATWELL *v.* RYAN . . . . . M. 21

COMMISSION: To examine witnesses . . . . . E. 240

See PRACTICE IN EQUITY. 2.

COMMITMENT.—*For disobedience of order.*] It is no defence to an application for committal for disobedience of an order to shew that the order is wrong.

*In re* BATEMAN, *Ex parte* THE BANK OF VICTORIA  
I. E. & M. 15

COMMON.—*Managers of, not occupiers, but owners under "Pounds Statute."*] Managers of a common are not the "occupiers," but are the owners under the "*Pounds Statute*" (No. 249); and as such do not come within the

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| proviso to section 32 of that Act, and are entitled to impound travelling stock upon the common, and within half a mile of a public thoroughfare.                                                                                                                                                                                                                                                                                                                                   |        |
| GOLDSBROUGH v. FLETCHER . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                   | L. 213 |
| COMPANY: Evidence of registration of . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                      | L. 87  |
| See EVIDENCE. 4.                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |        |
| COMPENSATION: For land compulsorily taken . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                   | L. 109 |
| See BOARD OF HEALTH.                                                                                                                                                                                                                                                                                                                                                                                                                                                                |        |
| COMPROMISE: Pending appeal . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                | E. 183 |
| See APPEAL. 1.                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |        |
| CONDITION PRECEDENT: Non-performance of . . .                                                                                                                                                                                                                                                                                                                                                                                                                                       | L. 13  |
| See ARBITRATION.                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |        |
| 2. ————— Certificate of Engineer . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                          | L. 77  |
| See CONTRACT. 1.                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |        |
| CONSTRUCTION: Of Acts of Parliament . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                       | E. 32  |
| See ACT OF PARLIAMENT. 1.                                                                                                                                                                                                                                                                                                                                                                                                                                                           |        |
| 2. ————— <i>Of Crown Grant.</i> ] On a question of the construction of words, the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the Crown or a subject.                                                                                                                                                                                                                                                             |        |
| DAVIS v. THE QUEEN . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                        | E. 106 |
| CONSTRUCTIVE TRUST . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                        | E. 182 |
| See BANK.                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |        |
| CONTEMPT: Of Court, attachment for . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                        | E. 175 |
| See ATTACHMENT. 1, 2.                                                                                                                                                                                                                                                                                                                                                                                                                                                               |        |
| ————— Of Legislative Assembly . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                             | L. 45  |
| See PRIVILEGE.                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |        |
| CONTRACT.— <i>Condition precedent—Satisfaction of Company's Engineer.</i> ] <i>W.</i> and another, contracted in writing with a mining company to put up machinery "to the satisfaction of the company's engineer." The work was done, and payments were made on account. <i>W.</i> and another sued for the balance. The engineer of the company proved that he was dissatisfied with the work, but the magistrates gave judgment for the Plaintiffs. On appeal decision reversed. |        |
| WALSH v. JOHNSTON . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                         | L. 77  |
| 2. ————— Imperfect, or honorary . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                           | E. 106 |
| See CROWN LANDS. 2.                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |        |
| 3. ————— Non-performance of condition precedent . .                                                                                                                                                                                                                                                                                                                                                                                                                                 | L. 13  |
| See ARBITRATION.                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |        |
| CONVICTION.— <i>Bad for excess of jurisdiction, may be quashed on certiorari—Reversal of, not equivalent to quashing.</i> ] <i>Sherwin</i> , J.P., fined <i>Hunter</i> under the " <i>Police Offences Statute</i> " for trespass, and stated an appeal case. The Supreme Court remitted the case, with its opinion that if a claim of title was made <i>bonâ fide</i> , the magistrate's jurisdiction was ousted. <i>Sherwin</i> reheard the matter, held that                      |        |

there was no claim of title made *bond fide*, convicted and "adjudged" that *Hunter* be fined 5s., and £7 7s. costs, and, in default of payment forthwith, imprisoned for five weeks. The conviction and warrant were bad, and *Hunter*, after lying six days in prison, was liberated on *habeas corpus*. *Sherwin*, under pressure, stated another case for the Supreme Court, on the hearing of which his determination was reversed. *Hunter* brought an action against *Sherwin* for false imprisonment and malicious conviction, and got a verdict for £50. On rule *nisi* to set aside the verdict, on the ground that the conviction had not been "quashed," as required by the "*Justices Act*" (No. 267), sec. 164:—*Held*, that a conviction, bad for excess of jurisdiction, can be brought up by *certiorari*, though *certiorari* is taken away by the statute under which the magistrate purported to act; that reversal on an appeal case, is not equivalent to quashing on *certiorari*; and that this conviction ought to have been, could have been, and had not been, quashed; and rule absolute for nonsuit.

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| HUNTER v. SHERWIN . . . . .                                  | L. 26  |
| CORPORATE PLAINTIFF: Proof of retainer of Attorney . . . . . | L. 216 |
| See PRACTICE AT LAW. 2.                                      |        |

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| CORPORATE SEAL . . . . . | E. 182 |
| See BANK.                |        |

**COSTS.**—*Allowed against Insolvent estate.*] Costs of a suit instituted by the official and trade assignees to set aside a settlement by the insolvent as fraudulent against creditors, allowed against his estate. Plaintiff's costs of certain motions made by the insolvent in such suit, and refused without costs, allowed to be charged against his estate. Costs of prosecution of insolvent's son on a charge of perjury, arising out of investigations in the estate, disallowed. Costs of opposing insolvent's certificate, allowed. Observations as to costs to be allowed petitioning creditor. Costs incurred by him in investigating insolvent's dealings, in protecting the estate, and in his appointment as trade assignee, disallowed.

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| In re KINGSLAND . . . . .                                                                                                          | I. E. & M. 25 |
| 2. ——— <i>Appeal under No. 310, sec. 48.</i> ] In appeals under No. 310, sec. 48, the General Sessions has no power to give costs. |               |
| REGINA v. POHLMAN . . . . .                                                                                                        | L. 109        |

8. ——— *As between solicitor and client.*] Specific devisees, made Defendants to a creditor's suit, where there is a deficient fund, are not entitled, whether adult or infant, to their costs as between solicitor and client. Their case is not in this respect, parallel to that of an heir-at-law in the case of an intestacy. The Plaintiff, and Defendants executors and trustees, are, however, entitled to their costs as between solicitor and client.

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| DIGHT v. MACKAY . . . . . | E. 163 |
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4. COSTS.—*At Petty Sessions in cases of indictable offences.*] Magistrates can only award costs in cases over which they have a summary jurisdiction, not in indictable offences; therefore, where *D.* was charged with perjury, and the case “dismissed with £10 10s. costs,” a prohibition was granted restraining the enforcement of the order for payment of costs.

*REGINA v. DALY* . . . . . L. 76

5. ——— *Of answer.*] A Defendant, against whom nothing is sought, should not inflict costs by putting in an answer.

*DIGHT v. MACKAY* . . . . . E. 163

6. ——— *Taxation of, Insolvent's right to attend.*] Observations as to insolvent's right to attend taxation of costs.

*In re KINGSLAND* . . . . . I. E. & M. 25

COUNTY COURT.—*Certificate of Judgment.*] *H.* and others in 1863, obtained a judgment in the County Court at Melbourne against *E.*, but issued no execution. In May, 1869, they obtained from the clerk of the court a certificate that the judgment was still in existence unsatisfied, and that £31 14s. was still due on it. On this certificate, they signed judgment in the Supreme Court, and issued execution. *E.* obtained a rule *nisi* to set aside the execution as a practical evasion of clause 40 of the rules of the County Court, against issuing executions on stale judgments, without order first made on summons to shew cause:—*Held*, that so long as the certificate stood, the judgment was right, and rule *nisi* discharged.

*HANCOCK v. EMMETT* . . . . . L. 142

CREDITORS' DEED.—A creditors' deed conveying the personal estate and effects only of the debtor, is not a valid deed within the Act No. 273, sec. 115, even though the debtor swear that as far as he knows he has no real estate. The word “or,” between “conveyance” and “assignment,” in that section must be read as “and,” an assignment not passing real estate.

*CARO v. DEVINE* . . . . . L. 258

2. ——— *Semble*, that a debtor who assigns all his property to trustees for the benefit of his creditors, on the faith of an agreement on their part that the debts due to them should be suspended, if not extinguished, ought not afterwards to be sued by those creditors for the same debts.

*GOLDSBROUGH v. McCULLOCH* . . . . . L. 113

CRIMINALS INFLUX PREVENTION ACT.—The “*Influx of Criminals Prevention Act*” (18 Vic., No. 3) applies equally to absolutely, as to conditionally pardoned criminals; and the Crown in assenting to that Act, expressed an intention that the Royal prerogative should be exercised subject to it.

*RYALL v. KENEALY* . . . . . L. 193

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- CROWN GRANT.**—Construction of . . . . . E. 106  
*See CONSTRUCTION.* 2.
2. ————— By presumption of law . . . . . E. 106  
*See GRANT.*
- CROWN LANDS.**—False declaration—Perjury . . . . . L. 157  
*See PERJURY.*
2. ————— *Imperfect or honorary contract.*] The 18  
 and 19 *Vic.*, cap. lvi., sec. 5, does not give to imperfect or  
 honorary contracts of the Crown a binding efficacy as  
 against the Crown.  
*DAVIS v. THE QUEEN* . . . . . E. 106
3. ————— *Lease—Covenant not to assign.*] The  
 permitting another to run stock on land leased under the  
 “*Land Acts*” (the covenant for improvements not being  
 complied with) is not a breach of the covenant not to  
 assign, it is only a license to agist.  
*RUSSELL v. PARKINSON* . . . . . L. 264
4. ————— *Lease—Evidence of Forfeiture.*] *Myles*,  
 a Crown lands’ bailiff summoned *McDowall* and another,  
 Crown lessees, for forfeiture of their land by breach of the  
 conditions of their lease under “*The Amending Land Act*  
 1865,” sec. 15; and in proof of the forfeiture, he put in a  
*Government Gazette* containing a notification of the for-  
 feiture, signed by the President of the Board of Land and  
 Works. The Defendants contended that the *Gazette* was  
 no proof of forfeiture. The magistrates held otherwise, and  
 determined to grant an order to dispossess. On appeal:—  
*Held*, that the *Gazette* is no evidence of forfeiture, but  
 evidence only of the intention of the Governor-in-Council  
 to enforce, by forfeiture, a breach of the law, or of the  
 terms of holding, if such breach have actually occurred;  
 that the magistrates should have enquired if such breach  
 had in fact occurred; and determination reversed.  
*McDOWALL v. MYLES* . . . . . L. 16
5. ————— *Lease—Improvements.*] Under paragraph  
 4, of sec. 14 of the “*Amending Land Act* 1865,” the  
 covenant to make improvements, is to make them within a  
 certain time, and the condition cannot be complied with  
 after that time. Therefore a breach of that covenant is  
 not a continuing breach, and may be waived by the Board,  
 as for instance, by receiving rent after knowledge of the  
 breach.  
*RUSSELL v. PARKINSON* . . . . . L. 264
6. ————— *Lease—Official Assignee of Crown lessee*  
 —*Registration of as assignee of lease.*] The official assignee  
 of an insolvent Crown lessee under the “*Amending Land*  
*Act* 1865,” is, after the expiration of the first three years  
 of the term of the lease entitled to be registered as assignee  
 of the lease by operation of law.  
*REGINA v. THE BOARD OF LAND AND WORKS.* . . . . L. 38

7. CROWN LANDS.—*Selection.*] The words "within a period" in sec. 10 of the "*Amending Land Act 1865*," as read by the light of sec. 21 mean "at a date," i.e., land may be proclaimed by the Governor-in-Council open for selection after a certain date not more than three months from the publication in the *Gazette*, and after that date such land is open for selection. Therefore, where land was gazetted as open for selection on a certain day, and was selected on the next day:—*Held*, that this was no objection to the selector's title.  
 RUSSELL v. PARKINSON . . . . . L. 264
8. ————— *Voluntary promise.*] The Moderator of the Presbytery of Melbourne applied 29th May, 1852, to the Government for a grant of Crown land as a site for a church, school-house, and manse. This application was assented to on behalf of the Governor by letter of 15th June. Trustees were appointed, and approved by the Governor-in-Council, 18th August, 1853. The land was taken possession of and fenced, and a school-house erected on part of the land. The remainder was not used for a church or manse, but buildings were erected upon it in 1855, which were let by the trustees, and the rents applied to general church purposes. No grant was issued by the Crown, and in November, 1868, the Board of Land and Works advertised for sale, under section 40 of the "*Land Act 1862*," the land not occupied by the school-house. On petition and bill by the trustees against the Crown and the Board of Land and Works, seeking to restrain the sale:—*Held*, following *The Mayor, &c., of Melbourne v. The Queen*, that the promise to give the land in trust for a particular purpose, and acts done by the trustees in pursuance of the purpose, did not entitle them to enforce the promise as a contract; that the Petitioners had no case as to any part of the two acres; and petition and bill dismissed with costs.  
 MACPHERSON v. THE QUEEN . . . . . E. 131
- DAMAGES.—*Measure of.*] In assessing the damages for loss of two horses shipped from England, and which died on the passage owing to the neglect of the ship's officers:—*Held*, that the jury must consider the value at the port of shipment, the profit, and the freight previously paid. The amount which the Plaintiff would have to pay for similar horses in Melbourne, ought to be the measure of his loss.  
 HORWOOD v. STACKPOOLE . . . . . L. 89
- DECEIT: Giving evidence of . . . . . E. 74  
*See EVIDENCE.* 1.
- DECLARATION.—Under "*Land Act 1865*." False . . . L. 157  
*See PERJURY.*
- DECLARATION OF TRUST.—*Statute of Frauds—Parties.*] *W.* and *H.* being in fact agents for undisclosed principals, agreed with *R.* and others to join equally in the purchase

of a special survey at Gipps Land, and paid to *R.* £1,024, being one-fifth of the purchase money. This was wholly the money of their principals, but *R.* had no notice that *W.* and *H.* were agents only. *R.*, with the money subscribed by *W.* and *H.* and others, selected land at Gipps Land, and signed a memorandum in writing, dated 13th May, 1841, that he would, when the Crown grant issued, stand seised of that land in trust for *W.* and *H.* and the other co-contributors. Subsequently, in 1842, *R.*, with the consent of the Crown, substituted for the land at Gipps Land, land near Geelong. *W.* and *H.* protested against this, and asked for the return of their money. *R.* did not comply with this request, but subsequently, with the consent of the Crown, selected land at Port Fairy in substitution for that at Geelong; and in 1847 obtained the Crown grant for the land at Port Fairy, and dealt with it as his own. In 1869, the representatives of some of the undisclosed principals of *W.* and *H.*, on behalf of themselves and other undisclosed principals, sued *R.* in equity to establish a trust against one-fifth of the land at Port Fairy:—*Held*, by the full Court, reversing *Molesworth, J.*, that the memorandum of 13th May, 1841, was a sufficient declaration of trust within the "*Statute of Frauds*" as to the land at Port Fairy; that *R.* held one-fifth of that land on an express trust within the "*Statute of Limitations*," for *W.* and *H.* or their principals. That the Plaintiffs, suing on behalf, sufficiently affirmed the investment on behalf of all the undisclosed principals, and demurrer over-ruled:—*Held*, also, that neither *W.* and *H.*, or their legal representatives, were necessary parties, and that the bill praying a sale, and not a partition, it was not necessary that the Plaintiffs should by it offer to redeem; mortgagees of *R.* made Defendants to the suit.

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| HUNTER <i>v.</i> RUTLEDGE . . . . .                                                                                                                                                            | E. 331 |
| DEPOSIT: On appeal—Cheque received as . . . . .                                                                                                                                                | E. 183 |
| See APPEAL. 16.                                                                                                                                                                                |        |
| 2. ——— Return of . . . . .                                                                                                                                                                     | E. 266 |
| See PRACTICE IN EQUITY. 1.                                                                                                                                                                     |        |
| DEPOSITIONS: Production of, on rule for prohibition . .                                                                                                                                        | L. 105 |
| See PRACTICE AT LAW. 7.                                                                                                                                                                        |        |
| DIRECTORS: Of Mining Company . . . . .                                                                                                                                                         | L. 231 |
| See MINING COMPANY.                                                                                                                                                                            |        |
| DISHONOR: Notice of . . . . .                                                                                                                                                                  | L. 178 |
| See BILL OF EXCHANGE. 2.                                                                                                                                                                       |        |
| DISTRESS— <i>For rent in arrear—Stray Cattle.</i> ] Where sheep<br>or cattle, by default of their owner, stray upon unenclosed<br>land, they may be immediately distrained for rent in arrear. |        |
| MAGUIRE <i>v.</i> DIXON . . . . .                                                                                                                                                              | L. 227 |
| 2. ——— Warrant of, issued <i>Ex parte</i> . . . . .                                                                                                                                            | L. 6   |
| See LUNACY STATUTE. 2.                                                                                                                                                                         |        |

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| DRAIN: Land taken compulsorily for . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | L. 109 |
| <i>See</i> BOARD OF HEALTH.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |        |
| EJECTMENT: Evidence of adverse possession . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | L. 225 |
| <i>See</i> ADVERSE POSSESSION.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |        |
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| <i>See</i> SIGNATURE.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |        |
| ESTOPPEL.— <i>Incorporated Company.</i> ] The rules which apply to estoppel as between individuals, are not applicable as between an incorporated company, and its members.                                                                                                                                                                                                                                                                                                                                                                                                                                                              |        |
| NOLAN <i>v.</i> ANNABELLA GOLD-MINING COMPANY . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |        |
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| 2. ————— Recitals in deed, effect of . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | L. 87  |
| <i>See</i> EVIDENCE. 4.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |        |
| EVIDENCE.— <i>Defence—Deceit.</i> ] Where a Defendant's defence is that he was deceived, he should be asked as a witness for himself, if he was so.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |        |
| LEARMONTH <i>v.</i> MORRIS . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |        |
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| 2. ————— Of forfeiture of Crown lease . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | L. 16  |
| <i>See</i> CROWN LANDS. 4.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |        |
| 3. ————— <i>Press copy.</i> ] The Act No. 197, sec. 29, makes a press copy evidence without comparison; but does not make it primary evidence except as to dispensing with notice to produce.                                                                                                                                                                                                                                                                                                                                                                                                                                            |        |
| HARRISON <i>v.</i> SMITH . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |        |
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| 4. ————— <i>Of Registration of company—Recitals in deed executed by Defendant prima facie evidence only.</i> ] G. was sued by the official agent of a mining company for contribution. The evidence of the registration of the company was defective, but the deed of association of the company, executed by G., and which recited the registration and incorporation of the company, was put in evidence:— <i>Held</i> , that the recitals in the deed were only <i>prima facie</i> evidence of the registration; and if it were proved <i>aliunde</i> that the registration was defective, the magistrates could adopt such evidence. |        |
| REEVES <i>v.</i> GREENE . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |        |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | L. 87  |
| EXECUTION.— <i>Leaseholds—Sale by Sheriff—Notice of sale.</i> ] The month's notice of sale required by 19 <i>Vic.</i> , No. 19, sec. 176, does not apply to the sale of a term of years.                                                                                                                                                                                                                                                                                                                                                                                                                                                 |        |
| HOUSE <i>v.</i> O'FARRELL . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |        |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | L. 98  |
| EXECUTOR.— <i>Also trustee.</i> ] Persons dealing with executors who are also trustees, are not bound to inquire whether the executorship has, or should have been, turned into a trusteeship; and are therefore not liable for parting with the assets to one only of three executors and trustees, by whom they are afterwards misapplied, without the knowledge of his co-executors and trustees.                                                                                                                                                                                                                                     |        |
| SAWYERS <i>v.</i> KYTE . . . . .                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |        |
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2. EXECUTORS.—*Commission to.*] Executors, in the absence of any provision in the Will, claimed a commission out of their testator's estate. (1) Under an alleged parol agreement with the testator. (2) Under an alleged bargain before taking out probate, with several of the persons interested under the Will:—*Held*, as to (1) That such an agreement was within the "*Statute of Frauds*," and must be in writing; and if not mentioned in the Will, would be contrary to the Wills Act, and inoperative; and as to (2) That such bargains should be discountenanced, as contrary to public policy. But, nevertheless, such a bargain is a ground why remuneration should be given under 15 *Vic.*, No. 10, sec. 16; and commission allowed accordingly.

CARTER v. MURPHY . . . . . E. 166

- FALSE IMPRISONMENT.—Action for, when conviction not quashed . . . . . L. 26  
See CONVICTION.

2. ————— Evidence in action for . . . L. 252  
See MALICIOUS PROSECUTION. 1.

*FEME COVERTE*.—Land was settled to the separate use of a *feme coverte* with restraint on anticipation. During her subsequent *discoverture*, she mortgaged to C. & W. She then re-married, and afterwards borrowed from the Plaintiffs money, wherewith C. & W.'s mortgage was paid off. By deed of 13th November, 1863, W. (survivor of C. & W.) re-conveyed to the trustees of the settlement, upon the trusts of the settlement; and by deed of 20th November, the *feme coverte* and her then husband mortgaged her interest under the settlement to the Plaintiffs. She subsequently repudiated the mortgage to the Plaintiffs, as in breach of the restraint on alienation. Upon bill for foreclosure, the Court being satisfied that the release of the old, and the granting of the new security, should be deemed one transaction:—*Held*, that the *feme coverte* purchased by the new deed a benefit to her separate estate; and was seeking to retain that benefit without paying the price she stipulated to pay for it, and should not be allowed to do so; and that she should be held bound by the second deed, so far as she had been bound by the first deed, but no further; and relief to this extent given, but without costs.

WEBSTER v. YORKE . . . . . E. 294

- FORFEITURE.—Of Crown lease—Evidence of . . . L. 16  
See CROWN LANDS. 4.

2. ————— Of Shares . . . . . L. 255, M. 38  
See MINING COMPANY. 2, 3.

- FRAUDS, STATUTE OF.—Agreement to pay Executors commission . . . . . E. 166  
See EXECUTOR. 2.

2. FRAUDS, STATUTE OF.—Declaration of Trust. . . . E. 331  
*See* DECLARATION OF TRUST.
3. ————— May be relied on though not pleaded E. 152  
*See* PLEADING IN EQUITY. 3.
- FRAUDULENT PREFERENCE.—Payment to a creditor who has taken out a writ and is pressing for payment, may be an unjust and fraudulent preference within the meaning of sec. 103 of the "*Insolvency Statute*," so as to be good ground for the refusal of a certificate:—*Semble*, that the fraudulent and unjust preference for which a certificate should be refused, is not necessarily one which could be avoided as a fraudulent preference under the Act.  
*In re* EDWARD WHITE . . . . . I. E. & M. 7
2. ————— *N.* and *K.*, traders in partnership, being indebted to *D.*, executed a bill of sale, to secure the antecedent debt, and a further sum paid on its execution. Within sixty days thereafter, the estate of *N.* and *K.* was sequestrated. Upon bill by *D.* against the assignees in insolvency of *N.* and *K.*:—*Held*, that notwithstanding the bill of sale was, in the opinion of the Court, executed *bonâ fide*, and without intent to prefer *D.* to other creditors, yet it was void within the "*Insolvency Statute*," No. 273, sec. 31; but so far only as it was a security for a pre-existing debt.  
DOUGLASS *v.* SIMSON . . . . . E. 32
3. ————— A payment within sixty days of insolvency is not void under the "*Insolvency Statute* 1865," sec. 31, if merely it has the effect of preferring the payee to another creditor. The preference must be fraudulent to make it void. It is not fraudulent if made under compulsion. Former cases reviewed, and *Douglass v. Simson* reversed.  
SHELDRIK *v.* AITKEN . . . . . L. 59
- FRIENDLY SOCIETY.—*Trustees of—Holding money under direction of c.q.t., not a misapplication within No. 254, sec. 36.*] The Loyal Brothers' Lodge, No. 3, Geelong, of Odd-fellows, was suspended by the committee of the Grand Lodge, for having, as was alleged, violated the constitution by-laws, rules, and regulations, of the Grand Lodge; and the trustees of the Lodge No. 3 were notified of this, and a demand made upon them to transfer £600 in their possession belonging to Lodge No. 3, to the Grand Master of the Order. The trustees, on the instruction of the Lodge No. 3, refused to comply with this demand. Thereupon an information was laid against the trustees by the District Deputy Grand Master, under the "*Friendly Societies' Act*," section 36:—*Held*, that the case did not come within that section, which was a penal one relating to the misapplication of money, whereas these Defendants were holding the money as trustees, under directions from the Lodge that appointed them.  
DARTON *v.* KNIGHT . . . . . L. 106

GENERAL WARRANT: Of Legislative Assembly. . . . L. 45  
*See* PRIVILEGE.

GOLD.—*Larceny of.*] Gold may be considered as taken from a vein or bed within section 104 of the "*Criminal Law and Practice Statute*," though the gold be in grains separated by particles of earth, provided it be in its natural position *in situ*.

REGINA v. DAVIS . . . . . L. 246

2 ——— *Mining Lease.*] *See* LEASE, MINING.

GRANT.—*By presumption of Law.*] *D.* was Crown grantee of land purchased by him from the Crown in 1853, and described in the grant as, *inter alia*, "bounded on the south by Wellington-street." At the time of sale a plan was exhibited, shewing Wellington-street as five chains in width. The Crown grant was in the usual form, no reference being made to this plan. In 1868, the Government advertised for sale the land in the centre of Wellington-street, as shewn upon the plan, leaving a carriage-way on each side. On petition and bill by *D.* against the Crown and Board of Land and Works to restrain this sale:—*Held*, by the full Court, reversing *Molesworth, J.*, that by presumption of law, the land forming "Wellington-street" *ad medium flum* *vix* passed to *D.* as the grantee of the adjoining land, and that the plan exhibited at the sale was admissible to shew what the words "Wellington-street" in the Crown grant meant; and interlocutory injunction granted to restrain the sale of the land forming the street, extending for the frontage of *D.*'s allotment, and from that frontage to the centre of the street, its width being deemed to be that shewn in the plan exhibited at the time of sale.

DAVIS v. THE QUEEN . . . . . E. 106

GUARANTEE.—*P.*, in consideration that the National Bank would make cash advances to *H.*, gave the bank a guarantee for repayment to the extent of £600 and interest. The bank made advances to the extent of £5,000, and took over mortgages, bills of lading, &c., as security for repayment of all cash advances. *H.* became insolvent. The bank did not prove or value their security, and allowed *H.* to get his certificate. In an action by the bank against *P.* on his guarantee, he pleaded, on equitable grounds, that the bank had not proved or valued their securities, whereby the risk of *P.* under his guarantee was materially, unduly, and improperly increased. On demurrer:—*Held*, that the bank was not bound to prove, and that the plea was therefore bad.

NATIONAL BANK OF AUSTRALASIA v. PLUMMER . . . L. 165

HABEAS CORPUS.—The Court has no jurisdiction to rescind an order of a Judge in Chambers, made on the return of a writ of *habeas corpus*.

*In re* GLASS . . . . . L. 103

2. **HABEAS CORPUS.**—Discharge of prisoner arrested under  
N.S.W. warrant . . . . . L. 8  
*See* MURDER.
8. ——— For discharge of prisoner under general  
warrant of Legislative Assembly . . . . . L. 45  
*See* PRIVILEGE.

**IMPOUNDING.**—*Notice—Specifying place of trespass.*] A memorandum delivered with impounded cattle to a pound-keeper, was headed, like a letter, with these words—“Loddon, Nov. 2, '68.” *Held*, that such a memorandum did not, within “*The Pounds Statute 1865*” (No 249), sec. 11, sufficiently “specify the place where the said cattle were trespassing.”

WINGFIELD *v.* GLASS . . . . . L. 4

**INFANT.**—*Maintenance out of corpus—Apprentice fee.*] Real and personal estate was given upon trust for conversion for the benefit of three infants, the proceeds to be paid them on their attaining majority, and the income in the mean time applied for their maintenance. Each infant's share in the personalty amounted to about £250, and the entire realty produced a rental of only £1 a week. Application for liberty to pay out of *corpus* a sum in aid of maintenance, and a premium of £50 as an apprentice fee with one of the infants, refused.

*In the matter of the will of* ANNE NEESON . . . . E. 319

2. ——— *Suit—Action of trespass—Leave of Court to institute.*] The mere filing of a bill by a next friend of an infant, seeking an account of the infant's property, and the appointment of new trustees, without any order having been made, does not make it a contempt for another person to proceed at law on the infant's behalf, by an action of trespass; and no leave of the Court to institute such proceedings at law, is necessary.

DURBRIDGE *v.* SCHOLES . . . . . E. 1

3. ——— *Ward of Court—Marriage—Trousseau.*] On the impending marriage of a ward of Court, order made referring it to the Master to inquire whether it would be proper to allow any, and what, sum out of her estate for the purchase of a trousseau.

WARE *v.* WARE . . . . . E. 326

**INFERENCES OF FACT.**—Leave to draw . . . . . L. 264  
*See* PRACTICE AT LAW. 6.

**INFORMATION.**—Court will not hear counsel for Attorney-General distinct from relator . . . . . E. 175  
*See* PRACTICE IN EQUITY. 3.

**INJUNCTION.**—A bill was filed to set aside a voluntary settlement as fraudulent, and to restrain an action brought by the trustees of the settlement against the official assignee of the settlor, to recover dividends received by him on

shares, part of the settled property. It appearing that the value of the shares was small, in proportion to that of the other settled property, injunction granted.

SHAW *v.* PATTERSON . . . . . E. 161

2. INJUNCTION: No appeal to Privy Council from order granting . . . . . E. 106

See APPEAL. 23.

3. ———— No appeal to Privy Council from order refusing . . . . . E. 228

See APPEAL. 22.

4. ———— Hearing motion for, pending demurrer . . . . . E. 329

See PRACTICE IN EQUITY. 4.

INSOLVENT.—*Examination of.*] On motion by a creditor for an order to compel the official assignee to apply for an order under sec. 87 of the "*Insolvency Statute*," for the insolvent's examination after certificate:—*Held*, that the Court had no jurisdiction to make the order, the power and discretion as to applying resting solely with the official assignee; but the official assignee not having made any affidavit explaining his refusal to apply, motion refused without costs.

*In re* IRELAND, *Ex parte* MADDEBS . . . I. E. & M. 5

2. ———— *Imprisonment of until satisfaction of debt.*]

*W. B.* an uncertificated insolvent, entered into an arrangement with his brother, *J. B.*, for carrying on business in the name of *J. B.* upon payment by *J. B.* of a salary to him, and a portion of the profits to his, *W. B.*'s, wife and children. Subsequently, the business was carried on in the name of *W. B.* the elder, the father of *W. B.*, and large profits made. Application was made by the Bank of Victoria, a creditor prior to the insolvency, for an order under 5 *Vic.*, No. 17, sec. 100, for *W. B.*'s imprisonment until payment of the Bank's debt; and it was sworn that the then assets of the business amounted to £20,000. In reply it was sworn that the liabilities of the business carried on subsequently to the insolvency amounted to £32,000, and that such subsequent business was carried on with the knowledge of the bank, and the official assignee of *W. B.* Order made for the imprisonment of *W. B.* until satisfaction of the debt to the bank, but that execution be suspended so long as *W. B.* paid £500 every six months in reduction thereof.

*In re* BATEMAN, *Ex parte* THE BANK OF VICTORIA  
I. E. & M. 15

INSURANCE, MARINE.—*Declaration of Interest.*] *P.*, by his agents, effected a floating policy of marine insurance under seal, over goods to be shipped at and from Melbourne "to port or ports in New Zealand," as interest might be declared. The declaration of interest was made by *P.*'s agents in a document not under seal, declaring the interest to be "in the sum of £462 10s. on merchandise by the ship *Goldseeker* to Hokitika, sea risk only." This declaration of interest was accepted by the assurers in a document not

under seal, containing these words: "Risk to cease on arrival at outer anchorage." The current rate to the wharf at Hokitika was greater than that to the outer anchorage there, and the smaller rate only was paid. The ship and goods arrived safely at the outer anchorage, but were lost between that and the wharf. *P.* sued for the value of the goods, contending that the policy under seal covered all risk to Hokitika itself, and that his agents were not in fact authorised to limit the policy, and could not in law limit a sealed instrument by an unsealed one, so as to make it cover sea risk only:—*Held* on demurrer, that unless the declaration of interest by *P.*'s agents were deemed a formal and binding one, there was no policy at all; and that if it were accepted at all, it must be accepted as a whole; so that *quidcunque viâ*, the Plaintiff must fail.

- PIZZEY v. SOUTHERN INSURANCE COMPANY* . . . L. 125
- JUDGE'S ORDER**—Rescission of . . . . . L. 103  
*See HABEAS CORPUS.* 1.
2. ——— Making rule of Court in Equity . . . L. 217  
*See PRACTICE IN EQUITY.* 5.
- JUDGMENT**—Application to set aside . . . . . L. 144  
*See PRACTICE AT LAW.* 5.
- JURISDICTION**—Of Justices ousted if claim of title made *bona fide*. . . . . L. 26  
*See CONVICTION.*
2. ——— [*Police Court.*] A police court is not a court of competent jurisdiction within the meaning of the Act No. 229, sec. 15.  
*HAZLEHURST v. KERRE* . . . . . L. 244
3. ——— [*Supreme Court—Criminal Information.*] Sec. 13 of 15 *Vic.*, No. 10, confers on the Supreme Court larger powers as to the granting of criminal informations, than the Court of Queen's Bench possesses.  
*REGINA v. McMECKAN* . . . . . L. 267
4. ——— Supreme Court—*Habeas Corpus* . . . L. 103  
*See HABEAS CORPUS.* 1.
- LARCENY**: Of Gold . . . . . L. 246  
*See GOLD.*
- LEASE, CROWN.** *See CROWN LANDS.* 3, 4, 5, 6.
- LEASE, MINING.**—A bill will lie by a lessee in possession under a gold-mining lease granted by the Crown under No. 291, to restrain a tortious mining on, and removal of gold from, the demised premises. In a trespass suit by the lessees under a gold-mining lease, granted by the Crown under No. 291, the Defendants relied upon a title derived from persons, at the time of the granting of the lease, in occupation under miners' rights of the land alleged to have been

trespassed upon:—*Held*, that such defence might be insisted on without a cross bill; and that it was not necessary for the Defendants to resort to a *scire facias* to set aside the lease. A gold-mining lease by the Crown under No. 291, if the parcels comprise land at the time of the demise occupied by the holder of a miners's right, who has not assented to the lease, is void, *quoad* the land so occupied, and no proceedings to set it aside are necessary. The applicant for a gold-mining lease under No. 291, must be a person, or a corporation; a contemplated company cannot be an applicant. The Governor is not warranted in granting a lease of auriferous land to an alleged assignee of the applicant, against the protest of the applicant; and—*Semble*, that the Governor has no power under No. 291, sec. 24, to grant a lease of auriferous land to any one but the applicant.

THE ALADDIN GOLD-MINING COMPANY REGISTERED,  
v. THE ALADDIN AND TRY AGAIN UNITED GOLD-  
MINING COMPANY REGISTERED . . . . . E. 266

2. LEASE, MINING.—*Evidence of Forfeiture.*] A mining lease granted under the Act No. 148, is not subject to regulations afterwards published under the Act No. 291, so as to make a notice of forfeiture, gazetted under them, evidence that the lessee had forfeited his lease.

JOHNSON v THOMSON . . . . . M. 13

LEASEHOLDS.—Notice of Sale by Sheriff . . . . . L. 98  
*See* EXECUTION.

LEGISLATIVE ASSEMBLY.—Breach of Privilege . . . L. 45  
*See* PRIVILEGE.

**LIBEL.**—*Privileged communication—Evidence of Malice.*] In an action of libel by *M.*, a common school teacher, against *W.* and others, who formed a minority of the local committee of the school, it was proved that the Defendants wrote a letter to the Central Board of Education containing four charges, all calmly written, and the third in these words: "3. That a number of children's names are entered as free pupils, on the plea of pauperism, such list of names not being attested by either a magistrate or clergyman of the district; in fact the list of names is not even laid before the committee." The sting of this charge, that the Plaintiff had lent himself to allowing pupils to be placed on the free list when they ought not to have been free, was not proved. The jury gave a verdict for £30. On rule *nisi* to enter a noursuit on the grounds that the libel was privileged, and that there was no evidence of express malice:—*Held*, that though this part of the letter was very small evidence of malice, it was some evidence, and enough to go to the jury and support their verdict.

MILES v. WEBER . . . . . L. 129

**LIEN ON WOOL.**—*Consent of prior Mortgagee.*] Plaintiffs in detinue for the recovery of wool from a carrier who claimed

a lien for carriage, proved two statutable liens over the wool, given to them by *D. & Co.*, by whom the wool had been delivered to the Defendant for carriage. At the trial it was admitted that there were two prior unsatisfied mortgages by *D. & Co.* of the sheep from which the wool had been shorn; and no sufficient evidence was given of the consent of the mortgagees to the giving of the liens:—*Held*, that the Plaintiffs had not sufficiently proved their title, and that the objection of the want of consent by the mortgagees, was one which the Defendant was at liberty to take: *Clough v. Laing* distinguished.

GOLDSBROUGH *v.* McCULLOCH . . . . . L. 113

2. LIEN ON WOOL.—Of Carrier . . . . . L. 113

See CARRIER.

**LUNACY STATUTE.**—*Consent on behalf of lunatic.*] Land was conveyed to such uses as *E. C.* should with the consent of her husband *R. C.*, appoint. *R. C.* became lunatic. *E. C.* being desirous of effecting a mortgage, applied for an order under the "*Lunacy Statute*," authorising the Master to consent on behalf of the lunatic:—*Held*, that so far as regarded the beneficial interest of the lunatic, the application should be under sec. 173, and either by the committee or the Master; and that, as to a power vested in the lunatic where he had no beneficial interest, the committee only, could give the consent under sec. 174, and not the Master. Sec. 143 does not apply where the consent of the lunatic is required for the protection of the rights of third parties.

*In the matter of* ROBERT CLELAND, a lunatic . . . . E. 128

2. ————— *Expense of examination—Distress warrant—Ex parte order—Prohibition.*] Under the "*Lunacy Statute*," No. 309, magistrates cannot issue a distress warrant against a shire council to enforce payment of the expenses of examining and removing a lunatic, without first giving the council affected, an opportunity of being heard against payment. Proceedings on an order made *ex parte*, for distress, for non-payment of an order to pay, prohibited.

REGINA *v.* PANTON . . . . . L. 6

**MAINTENANCE** . . . . . M. 5

See CHAMPERTY.

**MALICIOUS CONVICTION:** Action for, when conviction not quashed . . . . . L. 26

See CONVICTION.

**MALICIOUS PROSECUTION.**—*Evidence—Conversation.*]

In an action for malicious prosecution and false imprisonment, the jury were directed not to take into their consideration with reference to the false imprisonment a conversation between the Plaintiff and Defendant after the arrest, and before the Defendant signed the charge sheet:—



*Held*, that as regarded the malicious prosecution the evidence of the conversation was properly left to the jury; and that as regarded the false imprisonment, it was properly withdrawn from them:—*Held*, further, that the evidence of the conversation was open to the jury on the question of damages.

LANGAN v. CLARKE . . . . . L. 252

2. MALICIOUS PROSECUTION.—*Evidence of malice.*] *P.* having missed wood from a stack on his premises, employed a detective to watch. The detective took *W.*, the coachman of *P.*, to *P.*, and told him that he had seen *W.* take wood from the stack, throw it over the fence, and kick it in the direction of *W.*'s house. *P.* told the detective to take out a summons. Later in the day *W.* stated to *P.* that the wood had been taken for use in *P.*'s own coach-house. *P.* said it was too late for him to interfere. The magistrates dismissed the case. Pending the case before the magistrates *P.* retained *W.* as coachman, and he frequently drove out *P.*'s family. After the dismissal of the case, *P.* congratulated *W.* on his acquittal. *W.* sued *P.* for malicious prosecution, and obtained a verdict for £30. On rule *nisi* for a nonsuit:—*Held*, that the Court had only to consider the facts within, or brought to, the Defendant's knowledge, when he directed the summons to be taken out; that according to what the detective then stated to *P.*, there was evidence of a felony to go to a criminal jury; that the subsequent acts of the Defendant afforded no evidence that he did not believe the detective's statement at the time it was made; and rule for nonsuit made absolute.

WAUGH v. PALMER . . . . . L. 91

MANDAMUS.—The Court is bound to grant a *mandamus*, when satisfied that there will be a failure of justice unless it is granted.

REGINA v. ROGERS . . . . . L. 138

2. ———— Granted after decree quashed on *certiorari* L. 138

See CERTIORARI.

MANSLAUGHTER.—*Evidence to go to the jury.*] *L.* was supercargo of a ship conveying natives of Tanna, Palmar, and other islands in the South Seas, to be employed as labourers in the Fijis. A quarrel arose on board, between the Tanna and Palmar natives, and a serious disturbance occurred; the Palmar natives shooting with bows and arrows at the Tanna natives, and the crew. Muskets were given to the crew in the presence of *L.*, who said to *Louis*, one of the crew, in the presence of the cook, "Shoot if you can get a good shot at them," or "Fire down on them, and take good aim." About twenty minutes afterwards, and when the disturbance had to a great extent ceased, the cook held a light into the hold in which the Palmar natives then were, and three of the crew who had previously received muskets, neither of them being *Louis*, guided by the light, shot the Palmar natives dead. There was no evidence that

the cook ever communicated to either of these three, the order *L.* had previously given to *Louis*. *L.* was tried for murder, and found guilty of manslaughter. On special case reserved:—*Held*, per *Stawell*, C.J., and *Barry*, J., that it was for the jury to decide on the nature of the orders given; and to consider whether, during the interval between their delivery and the discharge of the last shot, circumstances had so changed, or so long a time elapsed, as to justify the conclusion that those orders had been virtually, though not expressly, withdrawn; and that their verdict ought not to be disturbed. Per *Williams*, J., *dissentiente*, there was no evidence to go to the jury, and the prisoner should be discharged.

REGINA v. LEVINGER . . . . . L. 147

MINE.—To constitute a place where mining operations are carried on, a mine, there must be a shaft, or something analogous to a shaft, but the distance of the shaft from the spot where the operations are being actually carried on makes no difference.

REGINA v. DAVIES . . . . . L. 246

MINER'S RIGHT.—*Land alienated from the Crown.*] Miners' rights confer no authority on the holders to enter on and take gold from lands alienated from the Crown without the consent of the proprietor.

REGINA v. DAVIES . . . . . L. 246

2. ————— *Multiplicity of.*] One person cannot, by obtaining a multiplicity of miners' rights in his own name, legally occupy a multiplicity of single men's claims; for the Act No. 291, sec. 3, does not enable a person to multiply himself, or his powers, by multiplying his miners' rights.

CAWLEY v. LING . . . . . M. 12

8. ————— *Vendor and purchaser—Specific performance.*] As between vendor and purchaser of a mining claim, it is not necessary that the purchaser should be the holder of a miner's right to enable him to sue in Equity for specific performance, it being sufficient if the vendor have one; and in the absence of evidence either way, the Court will not presume that the vendor had not a miner's right.

LEARMONTH v. MORRIS . . . . . E. 74

MINING COMPANY.—*Directors continuance in office.*] The deed of association of a mining company, registered under the Act, No. 228, provided that meetings should be held in February and August of each year for the appointment of Directors, and if no new directors were appointed at those meetings the former directors were to continue to act till new directors were appointed at the first meeting of the following year. Directors were appointed in February, 1866. In August, 1866, a meeting was called for the election of directors, but lapsed for want of a quorum. No meeting of the company was held after that date:—*Held*,

that under any circumstances, whether a meeting was held or not, the directors could not remain in office more than a year, and that a call made by them in August, 1868, was invalid.

BARFOLD ESTATE COMPANY *v.* KLINGENDER . . . L. 231

2. MINING COMPANY.—*Forfeiture of Shares.*] A company registered under the Act, No. 228, has no power under that Act, to make rules for the forfeiture of shares; and this, whether the rules are made and assented to, before, or after, registration.

JENKINS *v.* SPEED . . . . . L. 255

3. ————— *Forfeiture of Shares — Estoppel.*]

The Plaintiff, a shareholder in a company registered under the Act No. 228, assented to a rule under which shares might be forfeited by directors for non-payment of calls, and was a witness to affixing the company's seal to it. Shares of other shareholders were afterwards, to his knowledge, forfeited under the rule. Subsequently his own shares were forfeited under the rule for non-payment of a call, of which, owing to an accident, he had not received notice, though notice had been given as required by the rule. In a suit against the company to set aside the forfeiture, and recover the shares:—*Held*, that section 39 of Act No. 228, does not authorise the making of any rule for forfeiting shares; and that the Plaintiff was not estopped from impeaching the validity of the rule in question. Provisions for forfeiture are regarded as exceptional, and to be strictly construed.

NOLAN *v.* ANNABELLA GOLD MINING COMPANY . . M. 38

4. ————— Shares in, held by a Bank . . . E. 182

*See* BANK.

5. ————— Transfer of Shares in . . . . L. 79

*See* SHAREHOLDER.

- MINING SHARES.—*Calls—Recovery of, by Official Agent.*]

*B.*, official agent of a mining company, sued *B.*, in petty sessions for contribution on ten shares. It was proved that the ninth call was not paid up when the tenth and eleventh calls, which had been paid by *B.*, and the twelfth call were made. The Plaintiff contended that for this and other reasons, these calls were wrongly made; that Defendant paid the tenth and eleventh calls in his own wrong, and could not have credit for them. The police magistrate so held. On appeal, *Held*, that the company having received the calls from *B.*, was not entitled to compel payment of them a second time; and that the official agent was similarly disentitled.

REEVES *v.* BROWN . . . . . L. 85

- MISJOINDER: Of Co-Plaintiffs . . . . . M. 49, E. 182

*See* AMENDMENT.

BANK.

- MISREPRESENTATION : Conducting to contract . . . E. 74  
*See SPECIFIC PERFORMANCE.*
- MORTGAGE.—*Dower—Right to redeem.*] *Semble*, that where a wife joins her husband in a mortgage to bar dower, the deed not clearly indicating her total renouncement of dower in his favor, she is entitled to redeem the mortgage.  
 HOYLE v. EDWARDS . . . E. 48
2. ——— By *feme covert* . . . E. 294  
*See FEME COVERTE.*
3. ——— Under order of Court for payment of debts.] *S.* died leaving real and personal estate which he devised and bequeathed to trustees for the benefit of his wife and children. The personal estate was insufficient for payment of debts. Decree made in a friendly administration suit, authorising money for the payment of debts, to be raised by mortgage of the real estate, with or without power of sale, at the discretion of the Master.  
 STODART v. STODART . . . E. 59
- MUNICIPAL CORPORATION.—Prospective contracts . E. 141  
*See BOROUGH COUNCIL.*
- MURDER.—*On the High Seas—Extra Colonial Warrant—Escape—Habeas corpus.*] Where upon return to *habeas corpus* it appeared that the prisoner was detained in a Victorian gaol on a warrant issued in New South Wales, and backed in Victoria, and that he had been charged in New South Wales with murder on the high seas, but eluded capture in New South Wales and escaped thence into Victoria: *Held*, that he could not be sent back to New South Wales for trial, but must be tried in Victoria; and prisoner discharged from detainer on such warrant.  
*In re LEVINGER* . . . L. 8
2. ——— On the high seas—Evidence of—Manslaughter L. 147  
*See MANSLAUGHTER.*
- NOTICE: Of Appeal—Sufficiency of . . . E. 182  
*See APPEAL.* 18.
2. ——— Of dishonor . . . L. 178  
*See BILL OF EXCHANGE.* 2.
3. ——— Of Rate . . . L. 259  
*See RATE.* 1.
4. ——— Of Sale of Leaseholds by Sheriff . . . L. 98  
*See EXECUTION.*
- NOXIOUS TRADE.—Nuisance . . . L. 68  
*See NUISANCE.* 1.
- NUISANCE.—On rule *nisi*, calling on *M.* and *R.*, proprietors of a bone-mill, to shew cause why leave should not be granted to file a criminal information for nuisance against them:—*Held*, that the right to proceed by information is not taken away by the special enactments of the

"*Public Health Statute*," with regard to noxious trades; that the same principles which guide grand juries in England, should guide the officers here, who are the substitutes for the grand jury; and that the Defendants were liable to information in this case; but that the Court would interfere only in extreme cases; and as in this case the Central Board of Health had issued orders for the abatement of the nuisance, and the Court would presume that the Board would enforce its orders, the rule *nisi* would be discharged upon the Defendants paying costs. *Per Barry, J.*—If, in this colony, a noxious trade is established in a place, and people afterwards come to reside in the neighbourhood, or a road be brought to it, the public are entitled to complain; for judicial notice must be taken that this country is in a state of progressive location, and is only being inhabited by degrees.

REGINA v MCMEIKAN . . . . . L. 68

2. NUISANCE.—*Criminal information.*] Leave to file a criminal information for a nuisance granted, where proceedings before a Police Court, against the Defendants, for the same nuisance, had been dismissed.

REGINA v. MCMEIKAN . . . . . L. 267

NULLITY: Order not shewing jurisdiction . . . . . L. 218

See WINDING UP.

NULLITY OF MARRIAGE.—In a suit of nullity of marriage, it was proved that *J. M.*, the Respondent, introduced himself to the Petitioner as *J. G.*, whom she did not know personally, but with whose family she was acquainted. The Petitioner married him believing him to be *J. G.* In her evidence she said "I was induced to consent by his stating that he was *J. G.*, and belonged to the family of the *G.'s*, whom I knew to be respectable. If I had known nothing of the family, I should not have consented." Decree for nullity of marriage pronounced, on the ground that there had been an actual mistake of identity, and no consent by the Petitioner to a marriage with the Respondent, the fraud being unquestionably and distinctly proved.

ALLARDICE v. MITCHELL . . . . . I. E. & M. 45

OFFICIAL AGENT.—A mining company, registered under No. 228, and mining on land alienated from the Crown, was ordered to be wound up. The official agent filed a bill against the directors and manager, charging misappropriation by them of the company's gold and other assets; the concealment or mutilation of the company's books; and the improper payment of dividends out of borrowed money, and not out of profits. Prior to the winding-up order, the company had been sequestrated by order of the Supreme Court in Equity for breach of an injunction. On demurrer:—*Held*, by the full Court, affirming, *Molesworth, J.*, that under No. 324, sec. 6, the official agent was entitled

to sue in his own name, as representing the company; that the sequestration was no bar to his suing, the assets of the company not having come to the possession of the sequestrators; that the sequestrators were not necessary parties; and that the Attorney-General, as representing the Crown, was not a necessary party:—*Held*, by the full Court, reversing *Molesworth, J.*, that the shareholders who had received the dividends alleged to have been improperly paid by the directors, were not necessary parties.

REEVES *v.* CROYLE . . . . . E. 302

OFFICIAL ASSIGNEE.—*Commission.*] Commission of £5 per cent. allowed to official assignee, and £2 10s. per cent. to trade assignee.

*In re* KINGSLAND . . . . . I. E. & M. 25

2. ———— *Successor—Vesting of estate.*] *Seem*, that the appointment of a successor to an official assignee under 7 *Vic.*, No. 19, sec. 12, would in itself operate so as to transfer particular estates in his hands as official assignee.

*In re* BATEMAN . . . . . I. E. & M. 15

3. ———— Registration of official assignee of Crown lessee . . . . . L. 38

*See* CROWN LANDS. 6.

ORDER—Disobedience of—Committal . . . . . I. E. & M. 15

*See* COMMITMENT.

2. ———— Not shewing jurisdiction a nullity . . . . . L. 218

*See* WINDING UP.

PARDON: Conditional . . . . . L. 193

*See* CRIMINALS INFLUX PREVENTION ACT.

PARLIAMENT—Breach of Privilege . . . . . L. 45

*See* PRIVILEGE.

PARTIES.—*To petition against Crown to restrain grant of Crown lands.*] *Held*, that the Board of Land and Works were properly made Defendants to a petition against the Crown to restrain the sale of Crown lands, and that the petition would be defective if they were not parties.

DAVIS *v.* THE QUEEN . . . . . E. 106

PARTNERSHIP.—*F.* and *H.*, owners of a gold mine, agreed with *P.* to sell the mine on certain terms, within a time fixed, or otherwise the agreement was to be void. *P.* agreed with *D.* and *T.* that they should act jointly with him in forming a company to purchase the mine upon the terms fixed by *F.* and *H.*, and should receive half the benefit to be derived by *P.* under his agreement with *F.* and *H.* Before the expiration of the time *D.* and *T.* negotiated with *F.* and *H.* for the purchase of the mine themselves, and immediately after the expiration of the time purchased the mine. On bill by *P.* against *D.* and *T.* for a share of the benefit of their purchase:—*Held*, that the Defendants

were not guilty of any breach of partnership confidence towards the Plaintiff, and demurrer for want of equity allowed. There is no contract, either express or implied, that co-adventures in a contemplated purchase, to be completed within a given time, shall not deal singly with the vendor, for a bargain, to come into operation after the original bargain has expired by effluxion of time.

POKORNEY v. DITCHBURNE . . . . . E. 284

PAYMENT INTO COURT.—*By one of several Defendants.*]

*Buzzini* and others sued *Giovanni* and others in a Warden's Court for a mining encroachment, and obtained an order for £128 and £22 costs. Execution was issued against the mining claim of *Giovanni* and others, and also against the private property of each partner, and under this execution a levy was made on the private property of *Morganti*, a partner. An appeal was lodged, and *Morganti*, to free his property, paid into Court £150, and obtained a receipt as follows: "*Buzzini* and others v. *Giovanni* and others.—In the Warden's Court, Daylesford, 16th March, 1887. Received from *Maurizie Morganti* the sum of one hundred and fifty pounds for Plaintiffs' damages and costs. Chas. G. Robertson, W. C." On this payment the execution was withdrawn. The appeal was allowed as to *Morganti*, and dismissed as to the others. The Warden made an order for payment of the £150 to the Complainants, which was paid accordingly. *Morganti* sued the Warden for the £150, and on the trial it was left doubtful in what form the Warden's order was made, under which the £150 was paid into Court. There was a verdict for Defendant, with leave to Plaintiff to move to enter the verdict for himself. On rule *nisi*:—*Held*, that Plaintiff could not succeed, and rule *nisi* discharged.

MORGANTI v. BULL . . . . . L. 184

PERJURY.—*False Declaration.*] *J. M.* was informed against for that fraudulently intending to obtain the consent of the Board of Land and Works to an assignment to one *C. O.* of land held by *M. M.* under license from the Crown, he, *J. M.*, did go before a Justice of the Peace, and "knowingly falsely corruptly and wilfully voluntarily make and solemnly declare the truth of a certain declaration and then and there in and by such declaration did declare, &c., whereas in truth and in fact," &c.:—*Held*, that this declaration was one not imposed by law, but required only by usage of the Board of Land and Works; that a false declaration such as this, was not made penal by any section of the "*Evidence Statute*," because it was not declared under that Act; and was not made penal under the "*Criminal Law and Practice Statute 1864*," sec. 271, because it was not declared of the truth of any "fact, matter, or thing, by any law required or authorised, to be verified or otherwise assured or ascertained;" and conviction quashed.

REGINA v. MUNGOVAN . . . . . L. 157

PLAN OF DISTRIBUTION.—The trade and official assignees are bound to insert every proved debt in the plan of distribution.

*In re* KINGSLAND . . . . . I. E. & M. 25

PLEADING AT LAW.—*Argumentative traverse.*] *C.*, official assignee of the estate of *J.*, sued *K.* for money had and received to the use of *C.*, as assignee, and for money due on accounts stated between *K.* and *C.*, as assignee. *K.* pleaded never indebted; and mutual credits between *J.* and *K.*, which left, before *J.*'s sequestration, a balance due to *K.*, who offered to set off the moneys claimed by *C.*, as assignee. On general demurrer, *Held*, that as the moneys claimed were received by *K.* before the sequestration, the plea was on general demurrer as amounting to a second and argumentative traverse of the debt, a good though an unnecessary plea.

COURTNEY *v.* KING . . . . . L. 36

2. ————— *Equitable replication.*] Where a replication is pleaded "on equitable grounds," and cannot be sustained as an equitable defence, the Court will not reject these words, where the plea is put forward substantially as well as in terms, as a replication in equity.

GOLDSBROUGH *v.* McCULLOCH . . . . . L. 113

PLEADING IN EQUITY.—*Admissions.*] Admissions of a Defendant may be used as evidence of a case made by the bill, though not put in issue.

BRUCE *v.* LIGAR . . . . . E. 240

2. ————— *Part performance.*] A Plaintiff alleging in his bill an agreement, and acts of part performance, need not state in terms that he relies upon them as such.

JENNINGS *v.* TIVEY . . . . . E. 152

3. ————— *Statute of Frauds.*] A Defendant denying an agreement stated in the bill, may rely on the "*Statute of Frauds*" without pleading it.

JENNINGS *v.* TIVEY . . . . . E. 152

4. ————— Parties . . . . . E. 106, 331

See DECLARATION OF TRUST.  
PARTIES.

POSSESSION: Adverse—Evidence of. . . . . L. 225

See ADVERSE POSSESSION.

POWER OF ATTORNEY.—*Conveyance under—Registration—Evidence that principal alive.*] A conveyance of real estate purported to be executed under a power of attorney previously registered:—*Held*, that in order to shew a good title, evidence must be given that the principal was alive at the date of the registration of the power.

*In re* WOODS . . . . . L. 233



2. **POWER OF ATTORNEY.**—*Execution of deed under, before filing of power.*] If a deed be executed by an attorney under power, before the filing of the power under No. 204, sec. 98, the deed is not (unless confirmed) of any validity, either before or after the filing of the power.  
**PRATT v. WILLIAMS** . . . . . L. 22
- PRACTICE AT LAW.**—*Amendment of Record.*] *W.*, as administrator of his son, sued for damages for the death of such son. At the trial it appeared that the letters of administration were dated subsequently to the writ in the action, and *W.* was nonsuited. The year for suing having expired, on application for a rule *nisi* to amend the existing record by inserting as the date of the writ, a day subsequent to the issue of letters of administration:—*Held*, that the Court had no power so to alter the record, as to make it bear a false statement, and rule *nisi* refused.  
**WILKS v. THE AUSTRALIAN TRUST COMPANY** . . . L. 78
2. ——— *Attorney of Corporate Plaintiff.*] It is not necessary that the attorney-at-law of a Corporate Plaintiff should prove any retainer under the Corporate seal.  
**REGINA v. CALL, Ex parte GILLOW** . . . . . L. 216
3. ——— *Certiorari, application for.*] Application for *certiorari* to remove a case from the County Court should be made to a judge in Chambers.  
**GILMER v. BURMISTER** . . . . . L. 209
4. ——— *Certiorari.*] A Judge in Chambers may make an order absolute in the first instance for a *certiorari*. There is no sound distinction between the case of Justices and Wardens as to giving notice of application for a *certiorari*.  
**REGINA v. CARR** . . . . . L. 240
5. ——— *Judgment, application to set aside.*] Judgment was signed against a defendant after he became insolvent. Within a week after the official assignee heard that judgment was signed, he applied to have it set aside:—*Held*, that the application was made within a reasonable time, and judgment set aside.  
**PROUDFOOT v. MCKENZIE** . . . . . L. 144
6. ——— *Leave to Court to draw inferences of fact.*] Where leave is reserved to the Court to draw inferences as a jury, and the jury have found a verdict on a question of fact for the Plaintiff or Defendant, there being evidence both ways, the Court will not disturb the finding of the jury.  
**RUSSELL v. PARKINSON** . . . . . L. 264
7. ——— *Prohibition, Deposition, if any, must be produced.*] On a rule to prohibit justices enforcing an order, if depositions have been in fact taken before the justices, they must be produced.  
**REGINA v. NAPIER** . . . . . L. 105

8. PRACTICE AT LAW.—*Quo warranto*—*Proper officer to sign*.] The Prothonotary is the proper officer to sign an information in the nature of a *quo warranto*.  
 REGINA v. PETHYBRIDGE . . . . . L. 66
9. ———— *Writ of ca. sa.*]—Though the execution of a writ of *ca. sa.* is now by law prohibited, except under certain circumstances; the issue of such a writ is not prohibited.  
 PROUDFOOT v. MCKENZIE . . . . . L. 144
- PRACTICE, CRIMINAL.—*Evidence*.] It is a rule of practice, to be observed in all courts to which prisoners are committed, not to permit the examination of witnesses the knowledge of whose evidence has been withheld from the prisoner till the trial:—*Semble*, that such examination may be allowed where a very strong excuse, to the satisfaction of the presiding judge, is put forward by the prosecution. The propriety of the admission of such evidence is not a question of law within the Act No. 233, sec. 389.  
 REGINA v. BROWN . . . . . L. 239
2. ———— *Information — Assault — Verdict*.] Where an information charges a prisoner with having feloniously caused grievous bodily harm, and he is found guilty of a common assault, in the absence of any enactment giving a jury liberty so to find, the verdict cannot stand. Section 369 of the "*Criminal Law and Practice Statute*" (No. 233), gives no such liberty.  
 REGINA v. LONGMUIR . . . . . L. 237
3. ———— *Information — Stealing — Counts — General verdict*.] Where a verdict of "guilty" has been returned on an information for stealing on two classes of counts, the property being laid in different persons, the verdict need not be restricted to one or other of those classes; substantially only one class of offence is charged. The offence is the offence of stealing, and none of the charges contained in those counts can form the subject of any future information.  
 REGINA v. DAVIES . . . . . L. 246
- PRACTICE, DIVORCE & MATRIMONIAL.—*Service of citation out of jurisdiction*.] No special order is required for personal service of the petition and citation on the Respondent out of the jurisdiction.  
 PARKE v. PARKE . . . . . I. E. & M. 51
- PRACTICE, ECCLESIASTICAL.—*Administration — Sister's husband*.] Rule to administer freehold land granted to the husband of the sister of the intestate, the intestate's brother and heir-at-law declining to apply for a rule.  
 In re BALDWIN . . . . . I. E. & M. 40
2. ———— *Administration — Right of wife to*.] Gross misconduct of a wife, as such, will disentitle

her to administration of her husband's estate after his death ;  
but ante-nuptial want of chastity will not so disentitle her.

CAWLEY *v.* CAWLEY . . . . . I. E. & M. 41

3. PRACTICE, ECCLESIASTICAL.—*Advertisement.*] Where the relatives of an intestate were unknown, but he was believed to have been a native of London, advertisements of intended application for administration by the donee of a *donatio mortis causa* ordered to be inserted in the London *Times*

*In re* HOLTON . . . . . I. E. & M. 40

4. ———— *Attachment.*] Where costs of an Ecclesiastical suit were not paid pursuant to the decree, order absolute in the first instance for attachment granted.

CAWLEY *v.* CAWLEY . . . . . I. E. & M. 41

5. ———— *Caveat.*] Where a caveat is lodged without any undertaking to appear being filed as required by Supreme Court Rules, cap. viii., sec. 8, the Court will grant administration notwithstanding such caveat.

*In re* O'KEEFE . . . . . I. E. & M. 38

6. ———— *Codicil.*] Two documents purporting to be codicils to a will deposited in Scotland dealing with land there, the codicils dealing with the whole of the testator's real and personal estate in Victoria, admitted to probate as codicils without the will being proved.

*In re* WISE . . . . . I. E. & M. 39

PRACTICE IN EQUITY.—*Appeal—Deposit.*] Where an appeal to the full Court is dismissed with costs, no order is necessary for the payment to the Respondent of the £50 lodged in Court by the Appellant.

THE ALLADIN GOLD MINING COMPANY REGISTERED  
*v.* THE ALLADIN AND TRY AGAIN UNITED GOLD  
MINING COMPANY REGISTERED . . . . . E. 266

2. ———— *Commission to examine witnesses.*] An application for a commission to examine witnesses should be regarded almost as of right, if made *bona fide* ; but where a defendant was served with the bill in the colony, and before leaving put in his answer, but left the colony after express notice from the Plaintiffs that any application for a commission to examine him abroad would be opposed:—*Held*, that such Defendant was not entitled to a commission to examine him in England, as a witness on his own behalf.

BRUCE *v.* LIGAR . . . . . E. 240

3. ———— *Information—Relator—Counsel.*] In an information by the Attorney-General at the relation of a Municipal Corporation, and Bill by such Corporation, the Court can only hear counsel instructed by the solicitor

on the record; and cannot hear counsel instructed by the Attorney-General directly, to pursue a course different from that which the relators wish.

ATTORNEY-GENERAL *v.* BENTLEY . . . . . E. 175

4. PRACTICE IN EQUITY.—*Injunction—Demurrer.*] Pending a notice of motion for an injunction a demurrer was delivered:—*Held*, that the Plaintiff was not entitled to insist upon the demurrer being argued *instantly*; but only to the option of postponing the motion for an injunction, until after the argument of the demurrer.

MERRY *v.* HAWTHORNE . . . . . E. 329

5. ————— *Making Judge's order a rule of Court.*] Where a Judge's order in proceedings in Equity, is sought to be made a rule of Court, the application should be made to the Equity Court.

*In re* HOSKINS *Ex parte* BEVAN . . . . . L. 217

6. ————— *Previous leave of Court to institute suit.*] In cross suits in a Court of Mines, between the Working Miners' Company and the Prince of Wales Company, the decree fixed a boundary line, restrained the companies respectively from mining on opposite sides of it, and ordered an account, and payment of the gold taken beyond that boundary. On appeal to the Chief Judge of Courts of Mines, he varied the decree, by declaring that the boundary line should be deemed to determine the rights of the parties only with regard to their claims upon the Frenchman's Lead, and so far as shewn by then discoveries as to the course of leads. Upon bill in equity, filed by the Working Miners' Company against the Prince of Wales Company, stating that since the decree it had been discovered by subsequent workings that all the gold removed by the Plaintiffs south of the decreed boundary was upon the Golden Point Lead, and within the Plaintiffs' claim on that lead, and seeking an injunction against the Defendants prosecuting the decree in the Court of Mines, or further mining within the Plaintiffs' claim on the Golden Point Lead, and for an account:—*Held*, per *Molesworth, J.*, that the suit could not be properly commenced without the leave of the Supreme Court in Equity first obtained; and motion that the bill and writ of summons should be set aside for irregularity, granted with costs. On appeal, *Held*, that the rule requiring the previous leave of the Court, did not apply to proceedings instituted in different courts of co-ordinate jurisdiction, and appeal allowed with costs.

THE UNITED WORKING MINERS GOLD-MINING COMPANY REGISTERED *v.* THE PRINCE OF WALES COMPANY REGISTERED . . . . . E. 8

7. ————— *Solicitor on record.*] A notice of motion was served as for a Defendant by a solicitor,

not his solicitor on the record. Upon this o  
taken the motion was dismissed with costs.

TIERNAN v. NOLAN . . . . .

8. PRACTICE IN EQUITY.—*Taking evidence  
ance of Defendants.*] Upon a cause being calle  
evidence, some only of the Defendants app  
that the Defendants who appeared could nc  
proof of the bill, or notice of the setting d  
evidence, having been served on the Defen  
not appear; but that the Plaintiff might go  
risk of being able to prove this when the c  
hearing. When one of several Defendants  
jurisdiction, this should be averred in the b  
as part of the Plaintiff's case.

HONEY v. BUCKNALL . . . . .

9. ————— *Undefended Suit.*  
ing been overruled, the time for answering l  
and the Defendants not having obtained f  
answer, the Plaintiff set the cause down a  
On motion to set aside the setting down, a  
*Held*, that the obtaining time to answer, is t  
the Defendant, and not the duty of the Pla  
time having been obtained by the Defendant  
might either set the cause down as undefe  
for an attachment for want of an answer  
dismissed with costs.

ATTORNEY-GENERAL v. PRINCE OF WA

- PRACTICE, INSOLVENCY.—*Petition for seq*  
petition for compulsory sequestration must  
alleged insolvent had property in Victoria a  
alleged act of insolvency was committed;  
sufficient to allege the existence of property  
the time of the petition.

*In re* MACKINNON . . . . .

2. ————— *Summons — He*  
summons was headed "In the Supreme Co  
the matter of the Petition," &c.; but was not  
name, and was not addressed to any one:—  
summons was no sufficient "process" unde  
"Insolvency Statute," and rule *nisi* for com  
tration discharged with costs.

*In re* MACKINNON . . . . .

3. ————— *Suspension or re*  
*cate.*] The Commissioner has jurisdiction  
refuse a certificate at his discretion, although  
to oppose the granting of the certificate; b  
he should state the grounds of his objection  
certificate, so as to afford the insolvent an  
answering them.

*In re* MARSHALL . . . . .

- PREROGATIVE, ROYAL . . . . . L. 193  
*See* "CRIMINALS INFLUX PREVENTION ACT."
- PRESS COPY: Evidence . . . . . E. 182  
*See* EVIDENCE. 3.
- PRIVILEGE.—*Breach of—Legislative Assembly—General Warrant.*] A warrant of commitment by the Legislative Assembly for contempt, recited that the Legislative Assembly did on, &c., resolve that *H. G.* was guilty of contempt and breach of the privileges of the said Legislative Assembly, and that the Legislative Assembly had adjudged that he be, for the said offence taken into custody, &c.:—*Held*, on *habeas corpus*, that inasmuch as the Assembly had only such privileges as were enjoyed by the House of Commons in 1855, and possessed, therefore, limited powers only, the warrant should contain averments, or state grounds to shew that those powers had not been exceeded; that the warrant was therefore bad, and prisoner discharged. [Reversed in *P. C.*, *vide* *L. R.*, 3 *P. C.* App. 560]  
*In re GLASS* . . . . . L. 45
- PRIVY COUNCIL.—Colonial Judges should consider themselves concluded by an express decision of the Privy Council; and should receive their dicta as entitled to very great respect, but not as conclusive. *Bank of Australasia v. Harris* [15 *Moo.*, *P. C.*, 97], and *Nunes v. Carter* [*L. R.*, 1 *P. C.*, 342] observed upon.  
*DOUGLASS v. SIMPSON* . . . . . E. 32
- PROHIBITION.—At the return of a rule *nisi* under No. 267, sec. 136, to prohibit further proceedings on a conviction for breach of No. 227, sec. 45, it appeared that no conviction was yet drawn up, and that no "minute or memorandum" of the conviction was shewn; but it was sworn to be believed, that further proceedings would be taken by warrant, on the mere entry in the magistrate's book of the daily cause list:—*Held*, that on the return of such a rule, the "*Justices Act*" contemplates the exhibition to the Court of such materials as will enable it to amend the conviction if erroneous; and that a copy of the entry in the cause list affords no such materials; and rule for prohibition discharged.  
*In re LEWIS* . . . . . L. 1
2. ——— An order to prohibit stays all proceedings from the time of the issuing of the order, not from the time of its service. The "*Justices of the Peace Statute*," only allows prohibition to issue in cases of "conviction" or "order." A warrant of ejectment is neither a conviction nor an order.  
*REGINA v. CARE* . . . . . L. 245
3. ——— Restraining enforcement of order for costs L. 76  
*See* COSTS. 4.

**PROOF OF DEBT.**—*Sale of security by official assignee.*] A creditor having a bill of sale over insolvent's furniture as security for his debt, and claiming a lien on two deeds, gave up the deeds and agreed to a sale of the furniture by the official assignee on his behalf, the assignee consenting to his proving on the estate for the deficiency. This proof when tendered, was opposed by the insolvent as forbidden by sec. 81 of the "*Insolvency Statute*," and was rejected by the Commissioner:—*Held* by the full Court, affirming *Molesworth, J.*, that the proof was properly rejected.

*In re* KINGSLAND *Ex parte* WARBURTON I. E. & M. 10

2. ————— *Set off—Fraudulent preference.*] A proof cannot be met, by way of set off, by receipt of payment of another debt by way of fraudulent preference.

*In re* GROVES . . . . . I. E. & M. 36

3. ————— Rejection of—Appeal . . . I. E. & M. 10

*See* APPEAL. 17.

**PUBLIC PLACE.**—The board room of a District Road Board, though the proceedings of the Board are required by Act of Parliament to be conducted with open doors, and the public have a right of admission thereto, is not, during the sitting of the Board, a public place within the meaning of the 26th sec. of the "*Police Offences Statute*" (No. 265). *Swan v. McLellan* [2 W. W. & A'B., L., 6] in so far as it may be inconsistent with this case over-ruled.

*TAYLOR v. PHELAN* . . . . . L. 242

**QUO WARRANTO.**—Proper officer to sign . . . . . L. 66

*See* PRACTICE AT LAW. 8.

**RAILWAY COMPANY.**—By the Act No. 269, sec. 31, it was provided that the *H. B. Ry. Co.* should not be *obliged* to complete, maintain, or use, a piece of railway called the "loop-line," and if not completed, maintained, and used, within two years, the Crown land on which a part of it was constructed should revert to the Crown, and the Company might sell the purchased land, on which the remainder had been constructed. The Company completed and used for one purpose only, but not for general traffic, the portion of the loop-line constructed on private land, but no portion of that constructed on Crown land. The portion used crossed a public street on a level under a power in the Act authorising the construction of the whole line. The Municipal authorities threatened to remove the rails and gates at the level crossing as an obstruction to the thoroughfare, not under the circumstances warranted by the Act. On bill by the Company to restrain such removal:—*Held*, by the full Court, affirming *Molesworth, J.*, that the option given to the Company applied to the whole loop-line, and was to be exercised or not as regarded the whole; and that

the Company having acted as it did, must be taken to have abandoned the loop-line altogether; and motion for injunction refused.

THE MELBOURNE AND HOBSON'S BAY UNITED RAILWAY COMPANY v. THE MAYOR, &C., OF PRAHRAN E. 228

RATE.—*Advertising notice of.*] Sec. 186 of Act No. 178 is merely directory, and therefore the omission to advertise notices in accordance with the provisions of the section does not invalidate a rate made:—*Semble*, that any person aggrieved by non-compliance with the Act on the part of the councillors may institute proceedings against them for a misdemeanour.

SHIRE OF MCIVOR v. NOLAN . . . . . L. 259

2. ——— *Appeal—Person aggrieved.*] If a municipal assessment of property be made too high in order to qualify the owner to be a councillor, another ratepayer not the owner or occupier of the particular property is a person "aggrieved" within the Act No. 184, sec. 199, and may maintain an appeal against the assessment.

BROWN v. MAYOR, &C. OF FOOTSCRAY . . . . . L. 168.

3. ——— *Public Company—Works extending through adjacent Boroughs—Appeal from Petty Sessions against rating.*] Where a gas company has its works in one borough, and its mains and pipes extend into other boroughs, the basis on which the property of the company must be rated, is to take the gross receipts, deduct the gross expenses, and so arrive at the profits, the average of which, for a short period of years, will give the net annual value of the whole property, which is to be apportioned over all the boroughs in which the works are situate, or through which the mains and pipes pass. Appeal cases are, in this colony, allowed from decisions of petty sessions in rate cases.

MAYOR, &C. OF FITZROY v. COLLINGWOOD GAS CO. L. 72

RECITALS IN DEED.—Effect of . . . . . L. 87

See EVIDENCE. 4.

REGISTRATION.—*Of Mining Company—Certificate of.*] *Mandamus* granted to compel a clerk of a Court of Mines to issue a certificate of registration of a company which had been registered by his predecessor.

REGINA v. BARTROP . . . . . L. 84

2. ——— Evidence of . . . . . L. 87

See EVIDENCE. 4.

3. ——— *Priority of.*] *A* sold and conveyed land to *B*. Subsequently *A* became insolvent, and his official assignee sold and conveyed the same land to *C*. The conveyance to *C* was registered prior to the conveyance to *B*: *Held*, that *A* having prior to his insolvency, conveyed the legal estate to *B*, the subsequent conveyance by *A*'s official assignee to *C* was inoperative, and acquired no validity by its prior registration.

ANDREWS v. TAYLOR . . . . . L. 223



- REHEARING.**—Appeal from Warden practically is . . . M. 58  
*See* **APPEAL.** 7.
- RELEASE.**—None, of Defendant by discharge of co-Defendant  
 from contempt . . . . . E. 175  
*See* **ATTACHMENT.**
- REPRESENTATION:** Of co-Respondents not served . . M. 28  
*See* **APPEAL.** 9.
- ROAD BOARD.**—*Appointment of Clerk—Ordinary Meeting.*  
 The clerk of a District Road Board may be appointed at  
 the first meeting of the Board, as soon as the Board has  
 elected a chairman. Such first meeting is not an "ordinary  
 meeting" of the Board.  
**REGINA v. BONFELD.** . . . . . L. 174
- SEAL.**—Corporate . . . . . E. 182  
*See* **BANK.**
- SEQUESTRATION.**—*Release from.* An estate may be re-  
 leased from sequestration under sec. 42. of the "*Insolvency*  
*Statute*," although the assets being under £100, only one  
 meeting has been held.  
*In re* **LEETE** . . . . . I. E. & M. 36
- SERVICE.**—*Substituted—Order by Warden for.* A Warden  
 has no jurisdiction, before the hearing of a case, to direct  
 substitution of service of the summons.  
**REGINA v. AKEHURST** . . . . . L. 84, 244
2. ——— A Warden has no power, before the return of the  
 summons, to make an order to substitute service.  
**TAYLOR v. STUBBS** . . . . . M. 19
3. ——— Of notice of appeal . . . . . M. 28, 45  
*See* **APPEAL.** 9—14.
4. ——— Of notice to produce, no waiver of objection to  
 notice of appeal . . . . . M. 28  
*See* **APPEAL.** 14.
- SHAREHOLDER.**—*Mining Company—Transfer of Shares—*  
*Acceptance in Writing.* B. was sued in petty sessions for  
 calls on thirty shares in a mining company. The 12th rule  
 of the company required that "all transfers of shares in  
 the company, from or by any shareholder shall be made in  
 writing." B. from time to time purchased and held thirty  
 shares. As he purchased, the manager transferred them  
 into his name in the register. As to fifteen of these, the  
 transfer in the register was made on the written authority  
 of the vendor; as to five, on his verbal authority; and as to  
 the other ten, the transfer was ratified by writing by the  
 vendor after it was made. B. admitted in evidence that at  
 one time he held thirty shares, but said that he had never  
 accepted in writing any of the shares. None of the  
 shares had been transferred from B. in the books, and he

had attended a meeting as holder of five shares, of which no written transfer had been made. The magistrates gave judgment against *B.* On appeal:—*Held*, that there was evidence to go to the magistrates of a liability which *B.* had not disproved.

REEFS GOLD-MINING COMPANY *v.* BENNETT . . . L. 79

SHEEP.—Stray—Distress . . . L. 227

*See* DISTRESS.

SIGNATURE.—*Of Candidate in Municipal Election.*] Below the signatures of the ratepayers to the nomination paper of a candidate for election as a shire councillor, were the words "And I the above-named *James Greig* hereby consent to such nomination." This was not signed, but the words "*James Greig*" were written by that candidate. *Held*, that this was a sufficient signature by the candidate within the Act No. 176, sec. 84.

REGINA *v.* ODDIE . . . L. 221

SOLICITOR.—*See* ATTORNEY.

SPECIAL CASE.—Objections to the hearing of an appeal, as to service of notice, and preliminary objections to the hearing of a suit as to service of summons, may be the subject of a special case under section 171 of the "*Mining Statute.*"

MURPHY *v.* NEIL . . . M. 45

2. ——— Proper Judge to state . . . M. 1

*See* APPEAL. 3.

SPECIFIC PERFORMANCE.—*Misrepresentation.*] To a suit by the purchasers, for specific performance of a contract for the sale of a mine, the defence was that the vendors had been induced to enter into the contract by the misrepresentations of *B.*, the Plaintiffs' agent, who negotiated the purchase:—*Held*, per *Molesworth, J.*, that although *B.* had untruly disparaged the mine, mis-stated his own opinion of its auriferous nature, used some artifice to mislead the Defendants on the subject, and mis-stated his authority from his principals, yet this did not disentitle the Plaintiffs to specific performance; and there being no evidence that the Defendants relied on *B.*'s statements, specific performance decreed, but without costs. On appeal:—*Held*, by the full Court, that the Plaintiffs were responsible for *B.*'s representations, but that there was no proof that the Defendants were in any way misled by them; that conceding that misrepresentations were made, they were not made for the purpose of inducing the vendors to enter into the contract, nor was it obtained in consequence of any such misrepresentations; that *B.*'s acts had not been of such a character as to disentitle the Plaintiffs to relief in Equity; and appeal dismissed, but without costs.

LEARMONTH *v.* MORRIS . . . E. 74

STATUTE OF FRAUDS.—Trust . . . E. 331

*See* FRAUDS, STATUTE OF.

## STATUTES (IMPERIAL):

PAGE

- 18 & 19 Vic., cap. lvi., sec. 5 . . . . . E. 106  
*See CROWN LANDS, 2.*

## STATUTES (VICTORIAN):

*See ACTS OF PARLIAMENT, VICTORIAN.*

- STRAY CATTLE.—Distress . . . . . L. 227  
*See DISTRESS.*

STREET.—*Altering level of.*] In altering the level of a street within a borough, where that level has not been previously fixed, it is necessary for the Borough Council to make an order, and give notice, &c., in the manner provided by the Act No. 184, secs. 250 *et seq.*

HOLMES v. MAYOR, &c., OF BALLARAT . . . . . L. 210

- SUSPENSION.—Certificate of registration of . . . . . M. 62  
*See CERTIFICATE. 2.*

- TAXATION.—Of costs—Insolvent's right to attend . . . . . I. E. & M. 25  
*See COSTS. 6.*

- TENANT FOR LIFE.—Net rent—Annuity . . . . . E. 171  
*See WILL. 4.*

TOLL.—*American express waggon.*—At a toll-gate the tolls payable were "For every gig chaise coach chariot or other such carriage constructed on springs if drawn by one horse or other animal 6d. For every cart dray waggon wain or other such vehicle if drawn by one horse or other animal 1s.:"—*Held*, that an American express waggon, used by a storekeeper for the purposes of his trade, but suitable for carrying passengers, was liable only to the lower toll.

CROLL v. LINTON . . . . . L. 220

2. ——— *Exemption—Manure—Bone-dust.*] Two cart-loads of bone-dust were claimed, as manure, to be exempt from toll, under No. 176, sec. 252. One load was intended for export to Ceylon, where bone-dust is used as manure; the other was intended for sale, as manure to the farmers in the district:—*Held*, that the bone-dust for export was not exempt, and that for local use was exempt.

JOPLING v. LALOR . . . . . L. 3

TRADE MARK.—*H. & Co.*, brandy manufacturers, exported to Victoria their brandy in bulk and also in bottle, the latter being of superior quality to, and with a distinctive flavouring from the former. *W.* purchased *H. & Co.*'s bulk brandy, and bottled and sold it in bottles with corks, capsules, and labels, colourably imitating those of *H. & Co.*'s bottled brandy; but with the addition in small letters at the bottom of the label of the words "Bottled by *W. & Co.*":—*Held*, by the full Court affirming *Molesworth, J.*, that *H. & Co.* were entitled to an injunction to restrain *W.* from selling the brandy in bottles with labels, &c., so colourably imitating the Plaintiffs'. *Farina v. Silverlock* distinguished. Per *Molesworth J.*—The imitations of the Plaintiffs' brand

on the corks was strong evidence of an intention to represent the article as *H. & Co.*'s bottled brandy.

*HENNESSY v. WHITE* . . . . . E. 216

2. TRADE MARK.—*H. & Co.*, brandy manufacturers, exported to Victoria their brandy in bulk and also in bottle, the latter being of superior quality to, and with a distinctive flavoring from, the former. *H. M. & Co.* purchased *H. & Co.*'s bulk brandy, and bottled and sold it in bottles with labels colourably imitating those of *H. & Co.*'s bottled brandy; but *H. & Co.*'s corks and capsules were not imitated, and the labels had on them, in comparatively bold type, "Bottled by *H. M. & Co.*":—*Held*, per *Molesworth, J.*, that altogether there was no imitation of the cork, and a more palpable writing of the bottlers', as distinguished from the makers' name, than in *Hennessy v. White*, yet the case was not materially distinguishable from that case, and injunction granted.

*HENNESSEY v. HOGAN* . . . . . E. 225

TRANSFER OF LAND STATUTE.—*Order restraining registration from bringing land under the Act.*] A Judge in Chambers has no jurisdiction upon summons to make an order under the Act, No. 301, sec. 24, restraining the registrar from bringing land under the Act. To obtain such an order the Caveator must either bring an action, or file a bill.

*In re POWER* . . . . . L. 81

TRESPASS.—*D.* sued *W.* in the County Court for damage done in hunting. *W.* removed the action into the Supreme Court on *certiorari*, and paid £5 into Court. The jury awarded £5 more. The judge certified for the higher scale of costs. The prothonotary refused to tax unless on a special certificate that the trespasses were "wilful and malicious," which the Judge refused to give. A notice not to trespass had been, before the trespass sued for, sent by Plaintiff to Defendant, but it was a matter of contest whether it was received by the Defendant before the trespass sued for. On rule *nisi* to enter a suggestion on the record, to enable Plaintiff to obtain the higher scale of costs, it was contended for Plaintiff that the action, though "brought into" the Supreme Court on *certiorari* by the Defendant, was not originally "brought in" that Court by the Plaintiff; and that as the trespasses were after notice, Plaintiff ought to have his costs:—*Held*, firstly, that the action was brought in the Supreme Court when it was brought into it by *certiorari*; and secondly, that as the Plaintiff's evidence only shewed that the letter might have reached the Defendant within the necessary time, while the Defendant explicitly swore that it did not reach him till long afterwards, the Court ought not to allow the question to be further tried by suggestion on the record and traverse thereon, and rule *nisi* discharged.

*DUNN v. WALDOCK* . . . . . L. 41

TRUST.—Declaration of . . . . . E. 331

See DECLARATION OF TRUST.

TRUSTEE.—*Appointment of new Trustees.*] A testator left his Australian property to three trustees resident in Australia, and his English property to three trustees resident in England, and directed that each set of trustees should be entitled to a commission named. The will contained a power of appointing new trustees, with liberty to alter the number. An Australian trustee having died, two of the English trustees were appointed in his stead:—*Held*, that the appointment was valid; and that the trustees resident in England, were entitled from the date of their appointment, to their proportion of commission chargeable in respect of the Australian property.

GREEN v. NICHOLSON . . . . . E. 147

2. ——— *Misapplication of trust fund—Wilful default.*] A misapplication of trust funds does not warrant an account with wilful default against the trustees.

SAWYERS v. KYTE . . . . . E. 61

3. ——— *Misinvestment.*] *W.*, by her will, gave all her real and personal estate to trustees for sale and conversion, and investment “upon Government or real security or in or upon the shares stocks or securities of any incorporated company paying a dividend.” The trustees advanced £1100 to *B.* on his promissory note only, and alleged that they did so in consequence of a previous promise by the testatrix to *B.* to do so:—*Held*, that this was a misinvestment for which the trustees were liable.

SAWYERS v. KYTE . . . . . E. 61

4. ——— *Removal—Accounts.*] *B.* and *L.* were partners in a station. *B.* died, having appointed *L.* and others his executors and trustees. *L.* failed to account for the partnership assets. In a suit by two of the trustees and the *c. q. t.* as co-Plaintiffs, against *L.* and a fourth trustee as Defendants, for an account of the partnership, and the removal of *L.* as a trustee:—*Held*, that *L.* was not entitled, prior to his removal from the trust, to have the entire accounts of the estate taken, but only an account of his own receipts and disbursements.

BRUCE v. LIGAR . . . . . E. 240

UMPIRE.—Appointment of, a condition precedent . . . L. 13

See ARBITRATION.

VENDOR AND PURCHASER.—*Doubtful title.*] As between vendor and purchaser, a doubt upon a title makes it bad. The Court will not solve such a doubt, in a suit by the vendor for specific performance, in which the person having the doubtful claim is unrepresented.

HOYLE v. EDWARDS . . . . . E. 48

2. ——— *Plan exhibited at sale.*] Between vendor and purchaser, the latter purchasing some

land on a plan exhibited by the former, has no right to insist that the vendor must dispose of the rest of his property according to the plan, unless his contract expressly refers to it. Where the original contract has been carried into execution by deed, the Court will only consider the terms used in that deed, and the proper construction to be put on them.

DAVIS v. THE QUEEN . . . . . E. 106

VERDICT . . . . . L. 237

See PRACTICE, CRIMINAL.

**VOLUNTARY PAYMENT.**—Plaintiff being about to compound with his creditors at the rate of 8s. in the £, Defendants being creditors refused to assent unless they were paid 15s. in the £. Plaintiff, to obtain their assent, agreed to pay them at this rate by bills, one *D.* becoming surety for Plaintiff, and being himself secured by an absolute conveyance of land belonging to Plaintiff. When the bills became due Plaintiff, under advice of counsel, did not either himself resist payment, or ask *D.* to do so, but paid the bills; and after obtaining a re-conveyance of the property from *D.*, sought to recover the amount of the bills so paid:—*Held*, that Plaintiff could not recover back the amount so paid, he having paid voluntarily, without pressure, and with full knowledge of the facts.

HARRIS v. THE NATIONAL BANK . . . . . L. 261

**VOLUNTARY PROMISE.**—On the dissolution of a partnership between *J.* and *T.*, amongst other terms of arrangement *J.* promised *T.* that he would not again start in the same business in the same place, but refused to sign any writing to that effect:—*Held*, that *J.* had only bound himself by honor, and that *T.* could not protect himself from carrying out the other terms of the agreement for dissolution, by shewing that *J.* had not carried out his honorary engagement.

JENNINGS v. TIVEY . . . . . E. 152

**WAIVER.**—None, by service of notice to produce . . . M. 28

See APPEAL. 14.

**WARDEN.**—A Warden can not dismiss a summons with costs where the parties taking out the summons do not proceed with the case.

REGINA v. CARR . . . . . L. 240

2. ——— Appeal from . . . . . M. 28, 45, 54, 58  
See APPEAL. 5—14.

**WARRANT.**—Discharge of prisoner arrested in Victoria, on a N.S.W. warrant . . . . . L. 8  
See MURDER. 1.

2. ——— General—By Legislative Assembly . . . . L. 45  
See PRIVILEGE.

WIDOW.—Right of, to administration to husband I. E. & M. 41  
*See PRACTICE ECCLESIASTICAL. 2.*

WILL.—*Attestation of.*] A testator signed his will in the presence of one attesting witness. Some weeks after, the testator, with that attesting witness, attended at the house of another person, and informed him that the will which he then produced, had been signed by him and the first witness; and at the testator's request, this person signed his name as a second attesting witness in the presence of the testator and the previous attesting witness:—*Held*, that there was no attestation to satisfy the Statute; and administration granted as upon intestacy.

*In re LACEY* . . . . . I. E. & M. 44

2. ——— *Execution of—Signature of attesting witness by Initials.*] The initials of attesting witnesses to a will are sufficient signatures when affixed for the purpose of attestation.

*In re DYER* . . . . . I. E. & M. 43

3. ——— *Residuary gift—Accumulations.*] A testator devised and bequeathed all his property to trustees to convert, and, after payment of his debts, to invest the proceeds in Government securities, and pay out of the annual income certain life annuities to relatives named, and directed that after the decease of the last survivor of such relatives his trustees should pay, assign, or make over the whole residue of his property, estate and effects, and the securities on which the same should have been invested, as therein directed. There was a large surplus of income after providing for the annuities:—*Held*, that such surplus income was included in the residuary gift; and that the Court would not, by anticipation, deal with the question of the destination of surplus income, on the contingency of the period allowed by law for accumulation being exceeded.

*HASTIE v. CURDIE* . . . . . E. 91

4. ——— *Tenant for life—Net rents—Annuity.*] A testator's property, consisting of freehold houses, producing a yearly rental of about £150, and about £5,000 personality, was vested in trustees, as to the houses, for the widow in trust "to pay her the rents." Bequest were made as follows:—To the widow, "the annual income to be derived from the sum of £2,000 debentures," and "to invest £300 in debentures, and to pay the annual income" to testator's brother. The testator's only child was entitled to the residue. On case stated by the trustees, for the opinion of the Court:—*Held*, that the rents to be paid to the widow were the net rents, after deduction of the expense of keeping the property in tenantable repair, but not of insurance, which should be paid out of the *corpus* of the estate:—*Held* also, that interest on the sums of £2,000 and £300, by the Will directed to be invested, was not payable until after the expiration of a year from the testator's death.

*In the matter of the Will of FOLK* . . . . . E. 171

WINDING-UP.—*Order not shewing jurisdiction, a nullity.*]

Where an order for winding-up a mining company did not shew jurisdiction on the face of it:—*Held*, that it might be treated as a nullity, and a second order to wind-up the company be made without the first being set aside.

REEVES *v.* BOWDEN . . . . . L. 218

WOOL—Lien on . . . . . L. 113

*See* LIEN. 1.

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